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S. HRG. 100-1077

THE RULES ENABLING ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS AND ADMINISTRATIVE PRACTICE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

THE RULES ENABLING ACT

MAY 25, 1988

Serial No. J-100-70

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

99-496 ⇆ WASHINGTON : 1989

For sale by the Superintendent of Documents, Congressional Sales Office
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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Heflin, Hon. Howell, a U.S. Senator from the State of Alabama	1
Thurmond, Hon. Strom, a U.S. Senator from the State of South Carolina	69

CHRONOLOGICAL LIST OF WITNESSES

Panel consisting of Benjamin R. Civiletti, Chairman, Section of Litigation, American Bar Association; Janet Napolitano, Lewis and Roca, Phoenix, AZ; and John G. Koeltl, Association of the Bar of the City of New York, New York, NY	1
Panel consisting of Steve Burbank, professor of law, University of Pennsylvania, Philadelphia, PA; and Robert Richardson, Institute for Public Representation, Georgetown University Law Center, Washington, DC	33

ALPHABETICAL LIST AND MATERIAL SUBMITTED

Burbank, Steve:	
Testimony	33
Prepared statement	37
Civiletti, Benjamin R.:	
Testimony	1
Prepared statement	3
Koeltl, John G.:	
Testimony	13
Prepared statement	15
Napolitano, Janet:	
Testimony	4
Prepared statement	5
Richardson, Robert:	
Testimony	44
Prepared statement on behalf of the Alliance for Justice	47

APPENDIX

Additional Statements

Submitted by:	
The American College of Trial Lawyers	54
Paul D. Carrington, professor of law, Duke University	77
Joseph F. Weis, Jr., Chairman, Standing Committee on Rules of Practice and Procedure of the Judicial Conference	101

Correspondence

Letter to Hon. William H. Rehnquist, Chief Justice, U.S. Supreme Court, from Hon. Robert W. Kastenmeier, chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, March 30, 1988	111

Page

Letter to Hon. Robert W. Kastenmeier, chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, from Hon. William H. Rehnquist, Chief Justice, U.S. Supreme Court, April 12, 1988 112
Enclosures:
Excerpt from transcript of hearing on H.R. 3152 114
Excerpt from prepared statement of Judge Elmo B. Hunter, Chairman, Committee on Court Administration of the Judicial Conference of the United States 116
Letter to Hon. Joseph R. Biden, Jr., chairman, Committee on the Judiciary, U.S. Senate, from James E. Macklin, Jr., Deputy Director, Administrative Office of the United States Courts, January 13, 1988 118
Letters to the Subcommittee on Courts and Administrative Practice, Committee on the Judiciary, U.S. Senate, from:
L. Ralph Mecham, Director, Administrative Office of the United States Courts, September 10, 1987 120
A group of concerned citizens 121
Frederick G. Fisher, Jr., Hale and Dorr, counsellors at law, Boston, MA, September 6, 1988 124

THE RULES ENABLING ACT

WEDNESDAY, MAY 25, 1988

U.S. SENATE,
SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 11:26 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Howell Heflin (chairman of the subcommittee) presiding.

Also present: Senator DeConcini.

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HEFLIN. For this hearing, we have a panel including the Honorable Benjamin Civiletti, Chairman of the Section of Litigation, American Bar Association, and former Attorney General; Janet Napolitano, of Lewis and Roca in Phoenix, AZ, and John G. Koeltl, from the Association of the Bar of the City of New York.

We are delighted to have you all here today, and we would like to request that you summarize your statements and try to keep within the 5 minutes. Your full testimony will be made a part of the record.

Mr. Civiletti, please go ahead.

STATEMENT OF A PANEL CONSISTING OF BENJAMIN R. CIVILETTI, CHAIRMAN, SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION; JANET NAPOLITANO, LEWIS AND ROCA, PHOENIX, AZ; AND JOHN G. KOELTL, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, NEW YORK, NY

STATEMENT OF BENJAMIN R. CIVILETTI

Mr. CIVILETTI. Good morning, Mr. Chairman. I am very happy to be here, pleased to see you.

Twenty-eight years ago, I was a law clerk to a U.S. district court judge by the name of W. Calvin Chestnut, who at that time was about 75 years old and had been appointed, I believe, in 1930, so he had been on the Bench for 30 years. This was in 1960 and 1961.

When I came into the judge's chambers for the first time, he said to me:

Mr. Civiletti, I would like to commend to you that you become familiar with and understand thoroughly the new Federal Rules.

He said:

If you do that, that is all you will need to know about procedure and process in Federal suits.

There are two points to that which relate to the supersession clause which has been deleted in the House-passed version of the Enabling Act. One, even after 22 years of effectiveness, a distinguished Federal judge was considering these rules as new Federal Rules. Well, we have now had 50 years, and to the extent we can keep things intact, I think we are better off.

The second point of his remarks as relates to the deletion of the supersession clause goes along the same lines. I think he was accurate in saying that if you really do know the Federal Rules of Civil Procedure and the two leading commentaries with regard to them and the cases which have developed the law over the last 50 years, you encompass most of the procedure in any Federal court in the country, in any district, and with regard to almost any claim or defense. And that is a great, I think, saving, litigative saving, savings to the parties, and a basis of common national understanding.

Now, I don't think the change in the supersession clause is a risk to the Republic, but I do think that it may cause mischief. And one thing that we don't need in Federal litigation is more mischief. We don't need arguments based on alleged or purported or apparent conflicts between some other provision of the law and some other title in the Federal Rules with regard to process.

We also don't need—unless it is dramatically demonstrated—discrimination between the way in which different kinds of cases or different kinds of litigants are treated or handled. It is perfectly satisfactory to have parties decide on either expedited procedures or on foreshortening of a regular process in order to resolve their particular disputes, and it is perfectly proper to get maximum assistance to our Federal judges through the use of magistrates or other forms of preliminary review.

But I think the generality of the Federal Rules, their equal applicability to all litigants is a source of pride and equality.

Thank you, Mr. Chairman.

[Statement of Mr. Civiletti follows:]

STATEMENT OF

BENJAMIN R. CIVILETTI

"Proposed Deletion of Supersession Provision by the Rules Enabling Act Amendments of 1988"

I make three points in opposition to the proposed revision of the Supersession Clause.

First, the existing scheme has worked quite well. It is not broken. Substantive rights have not been invaded nor trampled. The process permits study, review, debate, adoption, and final review by Congress. It is of a whole. It fosters uniformity and legislative efficiency yet insists on the safeguards of Congressional review focused regularly and exclusively on procedure.

Second, the existing enabling language is time tested and by retaining it, we foster litigative economy. That is, there is one primary source for Federal process. Parties do not have to examine all of the titles of the U.S. Code to ascertain possible conflicts or even special references to other sources. Citizens throughout the country exercise their access to the same judicial process across a wide spectrum of subjects without discrimination.

My third point is simple stability. The federal system does not need a new point to spawn more motions, more cases and more uncertainty. Arguments on meaning or on conflicts between categories of rules and statutes is not remedial litigation. Must our litigation be meaningful based on rights or deprivations on substance, not procedure?

Senator HEFLIN. Ms. Napolitano?

STATEMENT OF JANET NAPOLITANO

Ms. NAPOLITANO. Thank you, Mr. Chairman.

My name is Janet Napolitano, and I practice with the law firm of Lewis and Roca in Phoenix, AZ. A great deal of my practice is litigation oriented, primarily in the Federal courts.

My testimony to you today boils down to one phrase: If it ain't broke, don't fix it.

The supersession clause was an original part of the Rules Enabling Act when that was passed in the early thirties. It has been in effect since then. It has worked well. There are not many reported cases under the supersession clause, precisely because it provides a bright line rule for litigants, for lawyers, and for judges whenever there is a possible conflict between a statute and a Federal rule. The supersession clause helps us assure that there is uniformity in procedure throughout the Federal system—a value that the Federal Rules and the original Rules Enabling Act were designed to ensure.

There has been, I understand, a question raised as to whether there is any continued utility to the supersession clause, and the question is whether all the conflicting statutes have been superseded already and no longer are in effect. My research shows that there are still some conflicts, and there are still cases arising where there is a possible conflict between a statute and a rule, and the courts rely on the supersession clause to preserve uniformity in the Federal system.

While supersession perhaps is not a gigantic issue in the Federal courts, as Mr. Civiletti said, eliminating supersession does create the possibility for mischief.

Finally, I have heard reference to the possible unconstitutionality of supersession. I would just mention that the Supreme Court has addressed the Rules Enabling Act specifically in the *Sibbach* case and didn't raise any separation of powers concerns there, and in the *INS* v. *Chadha* case, there is a footnote which specifically excepts, it seems to me, the report-and-wait provisions of the Rules Enabling Act from the separation of powers analysis in that case.

So the extent the Supreme Court has addressed it, they have not been troubled, and I know of no case that has come up through the Federal court system where constitutionality has been an issue.

I will reserve the remainder of my time. Thank you.

[Statement of Ms. Napolitano follows:]

STATEMENT OF JANET NAPOLITANO
SENATE JUDICIARY COMMITTEE
RE: PROPOSED DELETION OF SUPERSESSION
PROVISION BY THE RULES ENABLING ACT
AMENDMENTS OF 1988

May 25, 1988

I am an attorney at Lewis and Roca, a law firm in Phoenix, Arizona. My practice focuses on appeals in both state and federal courts and on matters of civil procedure. Since 1985 I have been a member of the Arizona State Bar Civil Practice and Procedure Committee and last year I chaired the subcommittee on local rules. I have been honored by an invitation to appear as a commentator at a national conference celebrating the 50th anniversary of the Federal Rules of Civil Procedure this October. My appearance today is at the request of the staff of the subcommittee on Courts and Administrative Practice of the Senate Judiciary Committee.

My remarks boil down to one theme: The proposed repeal represents harmful tinkering with a system that has worked well for 50 years and for no good reason.

I. The Supersession Clause Promotes Uniformity and Prevents Satellite Litigation.

As currently written, the Rules Enabling Act provides in relevant part:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions . . . .

> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution. . . .
>
> All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

28 U.S.C. § 2072 (1982).

Under present supersession practice, when a federal rule conflicts with any procedural component of a previously enacted statute, the rule governs. If the statute has been enacted later than the rule or if the conflict involves substantive rather than procedural rights, then the statute governs.

The proposed legislation would amend § 2072 to read:

> Such rules shall not abridge, enlarge, or modify any substantive right or supersede any provision of a law of the United States except any rule of practice or procedure or evidence -
>
> in effect on the day before the date of the enactment of the Rules Enabling Act of 1987.

28 U.S.C. §§ 2072(b)(1) and (2) (proposed). In other words, rules would never supersede statutes, <u>regardless</u> of whether the statute contained purely procedural elements.

The proposed legislation is a major change in the existing statute. Congress' intent in passing the Rules Enabling Act with its supersession provision was to achieve procedural uniformity throughout the federal system. As stated by Senator Ashurst, the Chair of the Senate Judiciary Committee:

> This bill is for the purpose of granting the Supreme Court of the United States the right and power to make general rules for the district courts of the United States and for the courts of the District of Columbia with respect to forms of process, pleadings, writs, and motions in civil actions. It does not in any sense destroy or abridge any right or any statute of any State. It does seek to secure some sort of uniformity in law cases in the Federal courts . . . .
>
> It is the opinion of the Committee on the Judiciary, as is also the opinion of the Attorney General, that no person will be deprived by the bill of any substantial right. It will tend to simplify and make uniform the pleadings and practice in law cases, and the Supreme Court of the United States will have the power to promulgate rules.

78 Cong. Rec. 9362 (1934).

Supersession was not merely incident to the Rules Enabling Act, it was at the heart of it. A prime, highly meditated purpose of the Act was to unify law and equity and to permit the rules process to supersede the statutes that provided separate procedures for the two branches of law. The proposed repeal of supersession would knock out a concept so important that without it the Rules Enabling Act may never have passed and it certainly could not have unified law and equity. For a list of the statutes deliberately superseded by name when the Federal Rules of Civil Procedure were subsequently enacted in 1938, see 12 Wright and Miller, Federal Practice and Procedure, pp. 364-65, n.3 (1973).

Since that original giant supersession in 1938, the supersession provision has continued to work remarkably well.

It has enabled the rules of procedure to be applied uniformly and has given confidence to lawyers and to litigants that the mechanics of filing a complaint, responding to an answer, conducting discovery, and trying a case, will not vary between one type of federal lawsuit and another.

That the supersession clause is easy to understand and apply is demonstrated by the fact that so few cases have litigated supersession clause issues during the 50 years since its passage. Nonetheless, the supersession clause still has utility in preserving uniformity throughout the federal court system. Several recent cases suggest the harm that could occur if the supersession clause were repealed.

In Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc., 772 F.2d 62 (3d Cir. 1985), the issue was whether in an admiralty suit against the United States under the Suits in Admiralty Act, 46 U.S.C. §§ 741-752, service of process that would be timely under Fed. R. Civ. P. 4(j) was nonetheless untimely because such service was not made on the local United States Attorney or the Attorney General "forthwith" as required by the statutes. The District Court ruled that "forthwith" meant something other than the 120 days allowed under Fed. R. Civ. P. 4(j) and dismissed the plaintiff's action. The Third Circuit reversed. Relying upon the supersession clause it held that Rule 4(j) governed and that so long as service was made within the 120-day limit of the rule, it was timely. If the supersession clause had not been in existence, or had been

repealed, the result in Jones & Laughlin Steel would have been to nullify the union of civil and admiralty rules which occurred in 1966.

Another illustrative case is Cederbaums v. Harris, 484 F. Supp. 125 (S.D.N.Y. 1980). This case involved a late notice of appeal from denial of a habeas corpus petition. The statute governing appeals, 28 U.S.C. § 2107, permits motions for extension of time only for the failure of a party to learn of the entry of a judgment, order or decree. On the other hand, Federal Rule of Appellate Procedure 4(a) provides for a motion to extend time for excusable neglect, without the failure to learn of a judgment limitation. If 28 U.S.C. § 2107 had been applied, the plaintiff would have lost his right to appeal, even though the facts of the case showed extreme diligence by his counsel. With the supersession clause, Fed. R. App. P. 4(a) governed and the right of appeal was reinstated.

In Waterman Steamship Corp. v. Gay Cottons, 419 F.2d 372 (9th Cir. 1969), and Albatross Tanker Corp. v. Amoco Delaware, 418 F.2d 248 (2d Cir. 1969), the issue was whether printing costs and proctor's fees could be recovered in full on appeal, or whether they were limited by 28 U.S.C. §§ 1923(a) and 1920(5). In both cases, the courts relied upon the supersession clause to hold that Federal Rule of Appellate Procedure 39(c) governed the award of costs and awarded the full amount requested.

These are just a few examples but they indicate the kind of conflicts that can arise and the opportunities for undermining the uniform system created by the federal rules if supersession is repealed. No one knows how many other possibly conflicting statutes are scattered through the statutes at large. Repeal would create opportunities for litigation over such issues as the meaning of "forthwith" where no such opportunity existed before. This will entail litigant time and expense and judicial resources to work out conflicts that now are resolved easily by the bright-line rule of the supersession clause.

In addition, this Committee should not overlook satellite litigation in all of the state courts that model themselves on the federal system and that have supersession clauses of their own. In this record already is a letter from Justice James Duke Cameron of the Arizona Supreme Court regarding the ripple effect on litigation in the state system if the federal supersession clause is revoked.

II. No Good Reason Exists to Repeal the Supersession Clause.

In light of the harm that could occur to a system that has worked without problem for 50 years, one might ask what are the reasons for repealing supersession. One stated reason is that supersession has become superfluous and that there are no more conflicts between statutes and rules. I disagree. Any such blithe assumption cannot be sustained in light of the

illustrations already given. We are not cited to one single injustice which has flowed from the supersession clause and clearly there would be misfortunes without it. There could scarcely be a clearer case of "If it ain't broke, don't fix it."

The other reason I have heard expressed regarding the supersession clause is that it violates the separation of power principles set forth in Immigration & Naturalization Service v. Chadha, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983). Chadha held that the one-house veto provision of Section 244 of the Immigration and Naturalization Act was unconstitutional because Congress is authorized to act in the legislative area only by approval of the House and the Senate, and presentment to the President. The argument seems to be that Chadha requires the amendment and repeal of statutes to conform with Article I and there is no provision allowing Congress to repeal or amend laws by any other means. Since supersession does not meet Article I requirements, it is unconstitutional.

Whatever the merits of this argument, no one has yet challenged the validity of a rule on the grounds that it was unconstitutionally enacted. Chadha was decided five years ago, more than enough time for such a challenge to percolate its way through the system.

Chadha also concerns what Congress must do when it passes a law. The Rules Enabling Act concerns what the Judiciary must do to pass a rule. The report and wait proce-

dure ; of Congress' delegation of rulemaking authority does not impli icate the same separation of powers concerns underlying Chadh ha.

Indeed, Chadha expressly acknowledges the statutory scheme e for enacting federal rules. It states at footnote 9:

> Without the one-House veto, § 244 resembles the "report and wait" provision approved by the Court in Sibbach v. Wilson & Co., 312 U.S. 1, 61 S. Ct. 422, 85 L. Ed. 479 (1941). The statute examined in Sibbach provided that the newly promulgated Federal Rules of Civil Procedure "shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session." . . . This statute did not provide that Congress could unilaterally veto the Federal Rules. Rather, it gave Congress the opportunity to review the Rules before they became effective and to pass legislation barring their effectiveness if the Rules were found objectionable. This technique was used by Congress when it acted in 1973 to stay, and ultimately to revise, the proposed Rules of Evidence. . . .

103 S. ;. Ct. at 2776 (emphasis in original). Thus, in Chadha, the Su upreme Court cited the Rules Enabling Act with evident approv)val.

III. Conclusion.

Absent compelling reasons, Congress should not repeal a stat tute that has worked well in providing guidance to lawyer rs, litigants, and judges for 50 years. Repeal can only breed l error by defeating the very uniformity which is the core purpos se of the federal rules. I urge this Committee to oppose repeal l of the supersession clause.

Senator HEFLIN. Mr. Koeltl?

STATEMENT OF JOHN G. KOELTL

Mr. KOELTL. Thank you, Mr. Chairman.

My name is John Koeltl. I am a member of the law firm of Debevoise and Plimpton in New York City, and I am the current chairman of the Federal Courts Committee of the Association of the Bar of the City of New York.

The association is an organization of nearly 18,000 lawyers with members throughout the United States and in foreign countries. The Federal Courts Committee takes continuing interest in the operations of the Federal courts, including issues relating to the Federal Rules of Civil Procedure.

Our committee consists of practicing lawyers both in private law firms and in the Government, as well as law school professors. We appreciate the opportunity to present our views to the committee.

In January, our committee issued a report on proposed amendments to the Rules Enabling Act, and we have provided that report to the committee. In that report, our committee endorsed several proposals for amendments to the rulemaking process, such as proposals to expand the membership of the standing committee of the Judicial Conference and to require open meetings for the rulemaking process, all of which would increase participation in the process and foster principles of openness.

However, we do not support the elimination of the supersession clause; we agree with the two previous speakers.

The purpose of the supersession clause is to supersede and displace all procedural laws and any procedural provisions of substantive laws that are in conflict with the Federal Rules of Civil Procedure. The clause does not preempt or purport to preempt any substantive law. By only superseding procedural provisions, the supersession clause furthers the purpose of the Rules Enabling Act to create a controlling, uniform set of Federal Rules; without the supersession clause, any procedural provision of law would continue to apply despite the conflicting provisions of the Federal Rules.

Now, we understand that in support of the elimination of the supersession clause, it is argued that the clause is no longer necessary because Congress is now aware of the possibly conflicting procedural provisions of other laws and statutes and has reduced or eliminated them.

We surely agree that the clause is less necessary today than it has been at times in the past. Over the last two decades, conflicts have rarely arisen. When those cases of conflict have arisen, however, the Federal Rules have appropriately prevailed. And as a matter of policy, as practicing lawyers, we believe that it is wise to have a uniform set of Federal Rules that consistently prevail over any conflicting procedural laws.

The fact that there have been few conflicts in recent years does not require elimination of the supersession clause. Indeed, elimination of the supersession clause opens the possibility for increased litigation over whether the Federal Rules are in fact valid or whether they are invalid because they conflict with other procedur-

al provisions. That is the kind of satellite litigation which we ought not to foster.

In essence ours is an argument from caution—since we can't know with confidence all of the possible acts of Congress that could come into conflict with individual Federal Rules, it is better to have the current supersession clause which ensures that there is a single prevailing set of rules that governs practice and procedure in the Federal courts.

We believe that it makes far more practical sense to allow the Federal Rules to prevail on all issues of procedure unless Congress specifically provides a different procedure in a new statute passed with full awareness of the current procedure provided by the Federal Rules.

The other argument for the elimination of the supersession clause is the constitutional argument based on the *Chadha* case in the Supreme Court (*INS* v. *Chadha,* 462 U.S. 919 (1983)). We have looked at the *Chadha* case, and we are unpersuaded that under *Chadha,* the present legislative mechanism of the Rules Enabling Act, including the supersession clause, would in fact be unconstitutional.

The abrogation provision of the supersession clause which we are talking about is distinguishable from the one-House legislative veto that the Supreme Court was addressing in the *Chadha* case. And in the *Chadha* case, the Supreme Court specifically excepted the report-and-wait provision from its analysis. As you know, under the report-and-wait provision under the Rules Enabling Act, unless Congress acts, the proposed rule becomes effective 90 days after being reported to Congress. With this provision, Congress can disapprove of a proposed rule by passing a law to be presented to the President which would nullify or amend the proposed rule. That is very different from the one-House legislative veto that was at issue in the *Chadha* case.

Therefore, the report-and-wait provision is a valid legislative alternative. Indeed, Professor Tribe in his article on the subject said that even the broadest reading of *Chadha* contains nothing that would prevent Congress from enacting the report-and-wait provision (Tribe, *The Legislative Veto Decision,* 21 Harv. J. Leg. 1 (1984)). And in *Chadha* itself, the Court noted with apparent approval its prior decision in the *Sibbach* case and noted with apparent approval the report-and-wait provisions in the Rules Enabling Act.

With all of that support in the recent *Chadha* case, we think it would be difficult to rely upon *Chadha* for the proposition that the supersession clause is somehow unconstitutional. The supersession clause has served us well for 50 years. We find nothing in the current State either of necessity or the constitutional arguments based on *Chadha* that should urge Congress to eliminate the supersession clause.

Thank you.

[Statement of Mr. Koeltl follows:]

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Amendments to the Rules Enabling Acts
By the Committee on Federal Courts
of the Association of the Bar of the City of New York

This report will examine the proposed Rules Enabling Act of 1987, amending certain provisions of Titles 18 and 28 of the United States Code commonly referred to as the "enabling acts." The "enabling acts" establish the process used to promulgate the rules of practice and procedure applicable in federal judicial proceedings and the Federal Rules of Evidence.[1]

The report is divided into two sections. Section I discusses the present process for promulgating federal court

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1/ H.R. REP. No. 99-422, 99th Cong., 1st Sess. (1985), which accompanies the amendments, always refers separately to the "rules of practice and procedure" and "the Federal Rules of Evidence." These terms are never combined in one general category. Undoubtedly, their separation reflects the difficulties encountered in 1973 when the Supreme Court endeavored to promulgate rules of evidence. Congress delayed their effective date, modified the proposed rules, and enacted a separate enabling act. The bifurcated references in H.R. REP. No. 99-422 certainly represent Congress's reaffirmation of the categorical differences between the "rules of practice and procedure" and the "Federal Rules of Evidence.

rules: Section II discusses the amendments against the background of the criticisms of the current system. The report endorses most of the proposed amendments because they will promote the important values of openness, responsiveness, and participation in the rulemaking process.

I. The Rulemaking Process

Since H.R. 3550 is intended to correct what Representative Kastenmeier and others have perceived as infirmities and abuses in the procedures used by the federal courts in rulemaking, some attention must be given to the existing rulemaking process.[2]

Rulemaking resembles a pyramid-like structure. The individual district court judges can issue standing orders of general applicability governing practice and procedures in his or her courtroom. These are sometimes referred to as "local, local rules." Almost without exception they are issued ex parte by district court judges with no opportunity for comment or review by the bar.

2/ H.R. 3550 has been reintroduced as H.R. 1507, 100th Cong., 1st Sess. Congress has never voted on H.R. 1507. On June 22, 1987 the House passed H.R. 2182 by a voice vote. The bulk of that bill deals with amendments to Title 18, the federal criminal code. The "Rules Enabling Act of 1987" was tagged to the end of H.R. 2182 and is virtually identical to H.R. 3550. The House bill has been referred to the Senate Judiciary Committee. For ease of convenience, however, the references in this report will be to H.R. 3550.

The "collective" district court adopts district-wide rules by a vote of the judges. These local rules apply to all cases heard by the judges of the district. It is estimated that there are 3000 such rules throughout the United States. H.R. Rep. No. 99-422, at 15 n.33. Under Rule 83, as amended in 1985, the district courts can promulgate rules only after notice and an opportunity for comment.[3] While this change was designed to put an end to what one commentator described as a "procedural Tower of Babel," several significant problems remained: (1) no structure was provided to review the rules of the Courts of Appeals or other federal courts; (2) no structure was provided to review the local rules at a national level; and (3) no meaningful standard was provided against which the local rules could be evaluated.

In the administrative structure of the courts, above the district court judges as a collective entity are the advisory

---

3/ Rule 83 provides in pertinent part:

> Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. . . In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

committees of the Judicial Conference which are appointed in the areas of civil, criminal, appellate, and bankruptcy law. The Chief Justice appoints each committee member and a reporter for the committee. When an advisory committee perceives the need for a new rule or an amendment to an existing one, the reporter prepares a draft text and a suggested "Committee Note." These documents, in turn, are forwarded to the full Advisory Committee which, in turn, reviews and revises them as it sees fit and submits them to the Standing Committee of the Judicial Conference. If approved by the Standing Committee, the text and note are printed and circulated to the federal courts, practicing bar and other interested groups for comments. Usually a period of six months is allowed for public comment. The comments are then collected and reviewed by the Standing Committee. Finally, a clean draft of a new rule or an amendment to an existing rule and a committee note is forwarded to the Judicial Conference.

The Judicial Conference itself is composed of twenty-seven judges: the Chief Justice who serves as its Chairman and 26 other federal judges -- the chief judges of each of the twelve Courts of Appeals, the Court of Appeals for the Federal Circuit and the Court of International Trade, and twelve district court judges elected for three-year terms by the circuit and district judges in each circuit. Generally speaking, the Judicial Conference adopts the proposed rule change without further amendment and forwards it to the Supreme Court.

The Supreme Court is at the apex of the rulemaking pyramid. If the Court approves the rule change, it transmits it to Congress no later than May 1 of each year. Unless Congress acts, the proposed rule becomes effective within 90 days after transmittal except that, in the case of the Federal Rules of Evidence, the amendment is not effective until 180 days after transmittal.[4]

II. Proposed Amendments to the Rulemaking Process

Three major criticisms have been directed to the current rulemaking process. First, in the view of the Subcommittee on Courts, Civil Liberties and the Administration of Justice, the closed nature of the existing rulemaking procedure leads to an overreaching by the promulgators of the rules at all levels. Second, there is criticism of the multiplicity of local rules, some of which conflict with the federal rules themselves. Third, scholars question the so-called "supersession provisions."

1. Lack of Openness

Many of the witnesses who testified before the Subcommittee complained that in promulgating rules the local

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4/ See § 2074, discussed, infra. As a result of technical amendments to H.R.3550, rules promulgated with respect to proceedings before magistrates are now subject to these same "layover" provisions. Currently, the magistrates' rules go into effect immediately upon promulgation. H.R. REP. No. 99-422 at 29.

district courts and courts of appeals either did not consult at all with the practicing bar or consulted with only a small segment of the bar. These witnesses testified that they were shut out of the rulemaking process, although they were litigating on a daily basis in the federal courts. Similar criticisms have been directed toward the various advisory committees. Not only have there been complaints of elitism, but there have also been complaints of "calcification" because of the infrequent turnover of membership on the advisory committees.

Accordingly, H.R. 3550 endeavors to open up the rulemaking process. Section 2073 requires the appointment of a "balanced cross-section of the bar" to the Standing Committee of the Judicial Conference, and requires that meetings of the Standing Committee and the advisory committees be open to the public unless a majority of the committee determines it is in the public interest to close the meeting. Section 2073 also requires the judicial council of each circuit to provide "appropriate public notice and opportunity for comment" before prescribing a rule of practice or procedure. Similarly, an amendment to 28 U.S.C. § 332(d)(1) will provide that orders promulgated by Circuit Judicial Councils shall be made or amended only after giving public notice and opportunity for comment. Finally, as an additional provision to encourage greater comment from the public and a cross section of the Bar, Section 2071(b) requires that any

rule adopted by a court of appeals or a district court be "prescribed only after giving appropriate public notice and an opportunity for comment."

We endorse these provisions to the Rules Enabling Act. They will encourage greater participation by all segments of the legal community in the rule making process, and will at least give the public some opportunity similarly to participate. We respectfully hope that the standing committee and the advisory committees will rarely use the provision allowing the committee to close a meeting to the public.

2. Proliferation of Local Rules

It is estimated that nation-wide there are over three thousand local rules at both the district court and court of appeals level. While it is recognized that these local rules serve valid interests such as communicating standard judicial practices to the bar and fostering efficiency, some can be criticized as contradicting the Federal Rules of Civil Procedure.[5]

5/ Among the examples cited by the Subcommittee are local rules requiring that certain civil rights complaints be verified, although Rule 11 provides otherwise; local rules that require that venue in certain cases brought by a prisoner be commenced in the district where the plaintiff resides; local rules requiring the bifurcation of trials in personal injury cases; local rules placing a flat ceiling on the number of interrogatories; and local rules authorizing the use of mediation and arbitration in civil cases, thereby rendering inapplicable the rules of evidence. H.R. REP. No. 99-422 at 14-15. This Committee does not necessarily agree that each of these local rules is inconsistent with the Federal Rules.

Thus, various amendments to the Rules Enabling Act are intended to eliminate or, at least, to minimize the proliferation of local rules inconsistent with other rules promulgated by higher authority. H.R. 3550 directs the Judicial Conference to compile district court and court of appeals rules. § 604(a). It also directs the Judicial Conference to review and abrogate any rule adopted by a district court which is inconsistent with a nation-wide, federal rule of practice or procedure or rule of evidence. § 332(d)(4). The amendment to section 331 of Title 28 further provides that the Judicial Conference shall review rules prescribed under § 2071 by the courts of appeals for consistency with the rules prescribed by the Supreme Court pursuant to §2072. It gives the Judicial Conference the authority to "modify or abrogate any such rule prescribed by a court of appeals found inconsistent in the course of such a review."

The proposed changes in the Rules Enabling Act do not explicitly provide any standard by which the Judicial Conference should determine "inconsistency." The legislative history states "the test should be whether the local rule can co-exist with the general rule without negating the purpose of the general rule." H.R. Rep. No. 99-422 at 27. It goes on to cite as examples of "inconsistent" local rules those that explicitly limit the number of interrogatories or condition admission to the bar upon residency within the state. Id. at 28.

Moreover, § 2073 dealing with the method for prescribing rules of procedure and evidence by the Judicial Conference contains a provision requiring the Judicial Conference to appoint a standing committee which in turn is required to review the recommendations of other committees appointed by the Judicial Conference in order "to maintain consistency and otherwise promote the interest of justice."

The Committee endorses the changes in the Enabling Act. A district court or court of appeals should not be allowed to promulgate a rule of procedure that is fundamentally inconsistent with uniform Federal Rules intended by the Supreme Court and Congress to govern procedure throughout the federal court system. The Committee urges, however, that this amendment to the Rules Enabling Act not be used to discourage local experimentation with local rules; only local rules "clearly inconsistent" with the national rules should be invalidated. The amendment to the Rules Enabling Act will still allow the local district court and court of appeals to fashion local rules; individual district courts and courts of appeals can develop rules designed to deal with problems unique to that district. However, the change in the Rules Enabling Act will help to prevent -- or at least to minimize -- the undesirable practice of promulgating local rules that limit a litigant's rights as provided for by Congress and the Supreme Court.

3. Supersession Clauses

As presently drafted the Supersession Clause provides "[s]uch rules shall not abridge, enlarge or modify any substantive right .... All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect". 28 U.S.C. § 2072.

The original Supersession Clause was included in the Rules Enabling Act of 1934, the first enabling act. Its inclusion was prompted by the belief that it was an impossible task for Congress to identify all the procedural statutes that the rules were intended to replace. In addition, it was thought necessary in order to avoid a conflict with the Conformity Act. H.R. Rep. No. 99-422 at 16.

The proposed amended Supersession Clause in section 2072 in H.R. 2182 reads as follows:

> (b) Such rules shall not abridge, enlarge, or modify any substantive right or supersede any provision of a law of the United States except any rule of practice or procedure or evidence -
>
> (1) in effect on the day before the date of the enactment of the Rules Enabling Act of 1987;
>
> (2) prescribed under this chapter; or
>
> (3) consisting of an amendment made by Act of Congress to a rule described in paragraph (1) or (2) of this subsection.

The principal difference between the current version of Section 2072 and the proposed amendment is the deletion of the language

"all laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." The obvious practical effect of this change is that the proposed Supersession Clause, unlike the current clause, would not declare any procedural provisions of substantive law to be of no further force and effect if they conflict with the Federal Rules.

Before analyzing the major substantive issues raised by the deletion we suggest a drafting change that will clarify an unintended ambiguity in section 2072. Read literally, the amendment suggests that the "rules shall not abridge, enlarge, or modify any substantive right . . . except." What it means to say is"[s]uch rules shall not abridge, enlarge, or modify any substantive right. Nor shall they supercede any provision of law . . . except . . . ." At a minimum, the Committee language should be changed to reflect the Congressional intent.

It is the House Subcommittee's position that the deleted language of the supersession clause is no longer needed and, moreover, that it is unconstitutional in light of INS v. Chadha, 462 U.S. 919 (1983). The need for a supersession clause is questioned because today's Congress, unlike its 1934 predecessor, is fully aware of the complete body of rules governing practice and procedure in the federal courts. In addition, the Conformity Act which in part gave rise to the original Supersession Clause has been repealed.

With respect to Chadha, it is argued that acts of Congress can be amended and repealed only in accordance with the procedures laid down in Article I. Thus, to the extent that the supersession clause appears to authorize the promulgation of rules inconsistent with or replacing statutes, it is perceived to be unconstitutional under Chadha.

We do not agree with these conclusions.

First, while it does not appear likely that there are many existing statutes with conflicting procedural components, we cannot rule out the existence of some such statutes. On that basis it would seem wise to retain the provision. With the deletion of the language, attorneys could challenge rules by reading substantive statutes to create procedural rules. Under section 2072 as presently drafted, if there is any conflict between a rule and a procedural component of a statute, the rule controls. The proposed amendment by deleting this language creates the opportunity for satellite litigation. We believe that it makes far more practical sense to allow the Federal Rules to prevail on issues of procedure unless Congress specifically provides a different procedure in a new statute passed with full awareness of the current procedure provided by the Federal Rules.

Second, Chadha should not be an obstacle to the present statute. In Chadha, the Supreme Court declared unconstitutional the one-house veto provision of Section 244 of the Immigration

and Naturalization Act of 1934 because it violated the Presentment Clauses, Art. I, § 7, cls. 2-3, and the bicameral requirement of Art. I, § 1 and § 7, cl. 2. Based on Chadha it is argued that only Congress can repeal a statute and that the repeal must conform to the requirements outlined in Chadha. This conclusion does not necessarily follow. Congress enacted the Rules Enabling Act pursuant to Article I. Certainly, this was a valid legislative act with respect to then existing statutes. With respect to subsequently enacted statutes, the issue becomes more troublesome. It is not intractable, however, because of the so-called "report and wait" provision which is contained in section 2074 of H.R. 2182, a direct antecedent of which has been in effect since 1934.[6] The Supreme Court approved the constitutionality of this provision in Sibbach v. Wilson & Co., 312 U.S. 1, 14-15 (1941).

While the Court in Chadha addressed only the constitutionality of the one-house veto provision, it did observe in dicta:

> Without the one-House veto, § 244 resembles the "report and wait" provision approved by the Court in Sibbach v.

6/ That provision reads as follows in pertinent part:

> (a) The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by the law.

> Wilson & Co., 312 U.S. 1, 61 S. Ct. 422, 85 L. Ed 479 (1941). The statute examined in Sibbach provided that the newly promulgated Federal Rules of Civil Procedure "shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session." . . . This statute did not provide that Congress could unilaterally veto the Federal Rules. Rather, it gave Congress the opportunity to review the Rules before they became effective and to pass legislation barring their effectiveness if the Rules were found objectionable. This technique was used by Congress when it acted in 1973 to stay, and ultimately to revise, the proposed Rules of Evidence....

462 U.S. at 935 n.9. This back-hand endorsement of the "report and wait" provision suggests that the Court might well distinguish the Supersession Clause from the one-house veto mechanism. Finally, while not controlling, it is significant that the Court has an institutional interest in sustaining the constitutionality of the supersessicn clause which it lacked with respect to the one-house veto provision.

Accordingly, the Committee believes that the Supersession Clause should not be deleted from the Rules Enabling Act.

Conclusion

Subject to the specific reservations and suggestions made in this Report, we support the proposals to increase the openness of the rulemaking process and to reduce the clear inconsistencies between local rules and the Federal Rules.

Committee on Federal Courts
John G. Koeltl, Chairman

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Richard Bemporad
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January 1988

Senator HEFLIN. Well, I certainly agree with you on the supersession clause. Without it, I don't really see how the rules could ever be effective against laws and provisions that we may pass in the future, or that may be out there, outstanding, even with all of the computerized methods.

Of course, there is a trend in judicial thinking, certainly at the State level, that the rulemaking function should be in the judiciary rather than the legislative body. In my State, we adopted a judicial article that conferred the rulemaking power on the court. In effect this article took this function out of the legislature. However, it does allow for the legislature to have some input. I believe in my State a two-thirds vote is required for an article to be repealed or changed.

I do have some problems, not with the supersession clause—and not a big problem—but on the *Chadha* decision. Of course, it is a one-House veto case, but the issue of presentment, presentation to the President, raises some issues. I don't know whether in this new Rules Enabling Act you could provide that in some way there be a presentment to the President for either a resolution of approval or something else that might eliminate any question about *Chadha*.

Do you have any comments on that? Of course, you have taken the position that it is not unconstitutional, but I think there could be arguments made that it is. Presently, while we are in the process of going forward with this hearing, there is a disagreement in the House on the supersession clause; we may argue with them and reach accord where the supersession clause stays in. If it does, as a matter of precaution should we look at the supersession clause relative to how *Chadha* could apply? If so, do you have any suggestions on that?

Mr. KOELTL. Senator, as you noted, I start from the proposition that I don't think that *Chadha* does cast doubt on——

Senator HEFLIN. Well, I start from that proposition, too.

Mr. KOELTL. And I think the Justice Department takes the same position in the letter that they sent to the House committee, and I think it would be unusual for the Supreme Court in the position they have been taking in the context of the rules to conclude that the supersession clause was unconstitutional.

I am reminded a little of the Supreme Court's language in the *Hanna* v. *Plumer* case, where they said we would have to assume that everything that we have been doing through this process was all wrong for all of these years. Now, that is possible, but it would be unlikely.

With respect to whether there is some way to include a presentment to the President in the process, presentment is obviously done when the Rules Enabling Act would be adopted, again by Congress. I don't see it offhand in the procedure for the report-and-wait provision, because the rules would go into effect if neither House of Congress simply does anything during that period, so there would be no occasion to present it to the President. But I would be happy to continue to think about that issue.

Senator HEFLIN. In most instances, there is no amendment made and the rule goes through. Just like an arms sale delegation, in the absence of a resolution of disapproval, then the President's delegated authority goes forward.

I am just exploring some language or some method that might eliminate any danger.

Do any of you have any thoughts on that?

Ms. NAPOLITANO. I would agree with Mr. Koeltl's remarks and just harken the Senator back to the Supreme Court's principle, which is that the Court does not address constitutional provisions or principles until it has to. It seems to me that by anticipating a possible problem that might exist with the Rules Enabling Act, we are doing precisely what the courts do not do, which is wait until a case or controversy arises where the thing can be squarely presented and squarely briefed and decided by a court. Then, if need be, the Congress can act to add a presentment provision if one is necessary.

But in the situation we are in now, Senator, there has been no such case or controversy, and no one has had an opportunity to fairly address either side of that issue.

Mr. CIVILETTI. I do not think presentment is necessary with regard to the rules; it is, of course, with the initiating act. And the main reason I think it is distinguishable is that there are no privileges, no rights, no deprivations, substantive ones, which are created by the process; and second, because the rules fit within one of those spaces in between the Separation of Powers that calls for a cooperative effort in order for the system to work rather than clink one against the other. And with the process and the delegation originally created, I think the Court would find that it is well within the constitutionality/interstitial relationships and would not require presentment just as it does not require affirmative action on both Houses in order to make a rule effective.

Senator HEFLIN. Well, thank you. We appreciate your testimony.

Senator DeConcini?

Senator DECONCINI. Thank you, Mr. Chairman. I regret not being here sooner. I have just a couple of short questions.

Mr. Attorney General, Mr. Burbank, who is going to testify next, comes to this conclusion in his written statement, that the question before us here today is simple, and I'd like to quote:

> When a provision of a statute passed by both Houses of Congress and signed by the President is inconsistent with the provision of the supervisory rule subsequently promulgated by the Supreme Court, which should control?

Do you agree with that? Is that really the question before us, or is that an oversimplification?

Mr. CIVILETTI. I think it is a decent simplification, and it leans a little toward dilution of the clause because in its preface, it slides over the fact that the Congress has the opportunity; it is not black against white, but Congress has the opportunity to focus its wisdom and its judgment in an overall form at the time the rule is laid on the table.

So to that extent, although it is not an affirmative action, by letting it go forward, it is certainly a judgment that that rule makes sense, is developed by experts, has been debated and so forth. So I think that the proposition is somewhat more on equal footing than the way it has been phrased.

And that brings up a point, I think, which is terribly important within the system. As we now examine the process, when the rules

come up and are on the table, the appropriate committees have the responsibility, have the expertise, the knowledge, and they focus on the amendments or changes which are suggested as a whole, looking at all the rules in all cases. If the supersession clause were deleted, that safeguard, that expertise, the central focus, would to some extent be jeopardized, because any bill, any piece of legislation unrelated to judiciary could have a procedural tack-on as to whatever subject matter was dealt with, without any wholeness examined in the course of it and could well be passed, although breaching very important principles of procedure.

Senator DECONCINI. Ms. Napolitano, in your written statement, you say that few cases have litigated supersession clause issues during the 50 years since it passed. Do you know how many have, or has anybody researched that?

Ms. NAPOLITANO. The precise number, no. I would say it is probably less than 35.

Senator DECONCINI. If there are so few cases that have litigated this clause, why do you feel the clause is still so vital, if it really isn't a problem of causing litigation?

Ms. NAPOLITANO. I think so few cases have litigated issues under the clause because it is so clear. It gives everyone direction. But even in the cases that have been litigated, Senator, there have been conflicts that have arisen.

For example, in my statement, I cite to you a 1985 case from the third circuit where there was a conflict between rule 4(j), which permits service of process within 120 days, and timely service of process requirements under the Suits and Admiralty Act. The district court had held that the plaintiff couldn't bring the action because he had not made timely service under the Suits and Admiralty Act. And the third circuit reversed and said no, rule 4(j) governs; we have unified civil and admiralty procedure, and service was timely, and the plaintiff's suit was reinstated. If we didn't have supersession, the court wouldn't have had as strong a hook to hang its hat on.

There are other cases. For example, there is a conflict between 28 U.S.C. 2107, which concerns appeals, and Federal rule of Appellate Procedure 4(a). That rule concerns when you need to file your notice of appeal, when you need to move for an extension to file a notice. And as we all know, that is jurisdictional, and if you are late, the appellant will lose his right to appeal altogether.

We have at least one case within the past 5 years where supersession came into play to reinstate an appeal because there was a conflict between section 2107 and the Federal Rule.

So, although there are not many cases, the ones that are out there indicate that there are some injustices that are being prevented and some uniformity that is being preserved by the continuing use of the supersession clause.

Senator DECONCINI. You also in your statement mention the ripple effect on litigation in the State system. Can you explain that to me, say the ripple effect as it relates to Arizona—or in other States, for that matter?

Ms. NAPOLITANO. Yes. Arizona is a State that mimics the Federal system, and we use the Federal Rules in Arizona to the greatest extent possible. And we have in our State a supersession equiva-

lent that the rules govern over any previously existing State statute. Because we follow the Federal system, the concern raised is that we would follow the Federal system with respect to supersession.

Arizona has not been as diligent as the Federal system in eliminating conflicts between statutes and rules, and we would engender satellite litigation on that score.

In addition, I am told by Justice Cameron of our State supreme court that there are probably at least 20 other States that are in the same ballpark—that is, they mimic the Federal system, they follow the Federal system, and we could expect that ripple litigation would occur not only in the Federal courts, but in those State courts as well.

Senator DECONCINI. Thank you.

Thank you, Mr. Chairman. I have no further questions.

Senator HEFLIN. Thank you. We appreciate your testimony.

We now call the next panel: Prof. Steve Burbank, professor, University of Pennsylvania Law School, and Mr. Robert Richardson, Institute for Public Representation, Washington, DC.

Professor Burbank, please go ahead.

STATEMENT OF A PANEL CONSISTING OF STEVE BURBANK, PROFESSOR OF LAW, UNIVERSITY OF PENNSYLVANIA, PHILADELPHIA, PA; AND ROBERT RICHARDSON, INSTITUTE FOR PUBLIC REPRESENTATION, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC

STATEMENT OF STEVE BURBANK

Professor BURBANK. Thank you, Mr. Chairman. I appreciate the opportunity to testify on the supersession issue.

As indicated in my statement, and with the partial concurrence of General Civiletti, I do believe that the question before you is simple and I hope that, notwithstanding your previous expression of views on it, I can change your mind.

When a provision of a statute passed by both Houses of Congress and signed by the President is inconsistent with a provision of a supervisory rule subsequently promulgated by the Supreme Court, which should control?

Now, it seems to me in answering that question—and in my prepared statement, I have indicated a number of questions that are not before you—that it is useful to recall a number of historical as well as practical facts.

First, supersession of statutes by court rules was an innovation when it was added to the bill that, as further refined, became the Rules Enabling Act of 1934. Contrary to an assertion made in Ms. Napolitano's prepared statement, supersession was not critical to the enactment of the Enabling Act in 1934; it was added in 1914 and not even noticed in 1934. Of course, very little was noted in the legislative history of the Enabling Act in 1934.

But more important, prior to 1934, the various Enabling Acts pursuant to which the Supreme Court promulgated rules, and in particular the Enabling Act for Equity Rules—and you will recall, Mr. Chairman, that the Supreme Court's Equity Rules of 1912 were perhaps the primary model for the Federal Rules of Civil Proce-

dure—required, at least as they were interpreted by the Supreme Court of the United States and lower Federal courts, that the rules so promulgated by consistent with statutes.

So if the Senate were to agree with the House and remove supersession, we would be returning to the system that has prevailed for most of our history.

Second, supersession of statutes by supervisory court rules was advocated for intensely practical reasons, and I believe that those practical reasons no longer obtain. Congress, as you know, undertook to repeal statutes that were obsolete and those that had been superseded by Federal Rules in 1948, and it also took that occasion formally to repeal the Conformity Act. If, as the Supreme Court and lower Federal courts have assured us time and time again, Congress legislates against the background of Federal Rules and does not lightly seek their displacement, there should be very few post-1948 statutory provisions that are inconsistent with Federal Rules.

Ms. Napolitano has come up with a few cases involving the supersession clause. I would point out, however, that the main case relied upon by her, the 1985 third circuit decision, involved rule 4(j) of the Federal Rules of Civil Procedure. Rule 4(j) of the Federal Rules of Civil Procedure is a statute. It was passed by Congress. It was not promulgated pursuant to the Enabling Act. That is to say, there was a proposed amendment that was sent over to Congress by the Supreme Court, but it was blocked by Congress, and rule 4(j) was passed by Congress, so that case did not present a problem of supersession at all; it involved simply the relationship of one statute to a subsequently enacted statute.

The other cases, to the extent that I have been able to analyze them in the few minutes available to me, involve problems arising from the fact that the Federal Rules of Appellate Procedure did not go into effect until 1968, and we did not have the same sort of weeding operation by Congress that we had after the Federal Rules of Civil Procedure went into effect.

If there are any more obsolete statutes, or statutes that should be superseded in light of rules that have been promulgated since 1948, it would be a simple enough operation for the rulemakers, in cooperation with the Congress to identify them and for them to be repealed.

In the few cases, therefore, in which there are inconsistencies between statutes passed subsequent to 1948, and rules, the Court's approach would suggest that the inconsistency was an advertent exercise of policy judgment by Congress in the face of a contrary judgment by the rulemakers. In that context, the question of supersession is whether the rulemakers should be able to come back with a rule asserting their policy preference, or asserting a wholly new policy preference, and thus require the Congress again to pass and the President again to sign legislation in order to prevail.

Third, under current law, not all Federal Rules supersede previously enacted Federal statutes with which they are in conflict. Congress repealed the supersession clause in the Enabling Act for bankruptcy rules when it passed the Bankruptcy Reform Act of 1978, and it seems to me that, particularly in light of some of the

things that you have been told, its reasons for doing that are of particular interest.

As explained in the Senate Report:

> This bill extensively revises the bankruptcy law. Nearly all procedural matters have been removed and left to the Rules of Bankruptcy Procedure. Consequently, the need to permit the Supreme Court's rules to supersede the statute no longer exists. To the extent a rule is inconsistent, the statute will govern.

So, whatever happens to the supersession clause—for instance, if the supersession clause were to be preserved—it seems to me that Congress would want to be very careful with respect to bankruptcy rules, because it has already made the judgment that bankruptcy rules should not supersede the provisions of the bankruptcy statute.

Fourth, debate about the supersession issue need not, and in my view should not, be shrouded in the obscurity of the procedure/substance dichotomy. The question under a regime of supersession or no supersession is the same—is there an inconsistency?

It seems to me that we may assume that the Federal courts would be as loath to find inconsistency under a regime of no supersession—the regime in the House bill—as they presently are when that question arises in connection with a subsequently enacted Federal statute. In the face of that attitude, and in the era of rule 11 sanctions for making frivolous arguments, we may also perhaps assume that the hypothetical lawyers you have heard about from the first panel would understand that satellite litigation is risky business.

Fifth, to say that the procedure/substance dichotomy, and hence the validity of Federal Rules, is a question analytically distinct from supersession is not to say that one can always usefully think about one without thinking about the other. As the experience with proposals to amend rule 68 on offer of judgment demonstrates, lawmaking often involves a choice between policies that all would agree are substantive and policies that all would agree are procedural. The view that one takes of the product of the lawmaking enterprise—is the provision substantive or procedural?—is likely to depend on the policies that triumph in the process.

Both the House reports on the legislation before you and Representative Kastenmeier's letter to the chairman are eloquent testimony to the role that the existing supersession clause has played in stimulating congressional intervention in Federal court rulemaking. They also establish that Members of the House, who are aware that the Supreme Court has never declared a Federal rule invalid, do not regard frequent and active intervention in the rulemaking process as a sign of its good health.

Sixth, under the current system, the rulemakers have manifested a disturbing ignorance of, or inattention to, statutory provisions that were germane to the matters before them, and it is difficult not to regard the supersession clause as a major contributing factor to their attitude. If there were no supersession, the rulemakers would be encouraged to pay close attention to existing legislation and, where it was deemed obstructive of enlightened procedural reform, to recommend its repeal.

Finally, the tendency in modern court rulemaking, contrary to the impression you have been given by members of panel 1, is not

toward uniform rules except in the most trivial sense. It is toward rules that eschew policy choices, that do not make any policy choices, in favor of broad grants of discretion to individual trial judges.

With respect to Federal Rules of that type, Congress' ability to conduct an informed review under the report-and-wait provisions in the Enabling Acts, a cumbersome mechanism in any event, is highly questionable. More important, I have yet to hear a good argument why such Federal Rules—that is, Federal Rules that don't make policy choices, but rather confer discretion on trial judges—should not be treated like Federal common law. And as you know, Federal common law is required to be consistent with statutes.

In this light, it seems to me in any event that the answer to the question before you is as simple as the question itself. You have on the one hand the documented costs of the existing supersession clauses, none of which after 1948 has any documented benefits. Ranged against those costs, which Congress itself has incurred, as indicated in the House reports on this legislation and in Representative Kastenmeier's letter to the chairman, is the specter of satellite litigation, a specter without sufficient substance to sway the Judicial Conference of the United Sates—which is certainly no stranger to satellite litigation, and one whose in terrorem effect depends on unarticulated assumptions about the attitude of courts that are flatly inconsistent with the attitude expressed in numerous opinions, as well as with articulated assumptions about the behavior of lawyers that hardly do credit to the profession.

Ultimately, I think the question of supersession may depend on the value one places on symbols. I am uncomfortable with the messages conveyed by the existing supersession clauses. As I have suggested, one message is to the rulemakers, and that message is that they need not be concerned about Congress' policy choices as they go about their work. A far more troublesome message, it seems to me, is that the policy preferences of judges and their advisors, acting in a legislative capacity but without popular mandate or all of the restraining influences of the legislative process, are entitled to supremacy when they conflict with the policy preferences of the people's representatives. Whether or not the existing supersession clauses are consistent with the formal requirements of the Constitution, therefore, they are not, at least for me, consistent with the vision of a democratic society that inspires it.

Thank you very much.

[Statement of Mr. Burbank follows:]

PREPARED STATEMENT

OF

STEPHEN B. BURBANK
PROFESSOR OF LAW
UNIVERSITY OF PENNSYLVANIA

BEFORE THE

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON

THE RULES ENABLING ACTS

MAY 25, 1988

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to testify on proposals to amend the Rules Enabling Acts, and in particular to address the question whether rules promulgated by the Supreme Court to regulate procedure in the lower federal courts (supervisory court rules) should supersede inconsistent statutes previously enacted by Congress.

I come to this subject with the sustained interest of one who has studied the history of federal court rulemaking, analyzed and commented on proposed amendments to the Federal Rules, drafted procedural rules to implement a statute passed by Congress in 1980, and who is presently serving as reporter of a Third Circuit Task Force to study Rule 11 of the Federal Rules of Civil Procedure, as amended in 1983. I have also consulted with, and testified before, members of the House of Representatives on the legislation now being considered by the Senate, including the provision for no supersession. Indeed, because my views are rather fully stated in the House's hearing record and in my letter to members of this Subcommittee dated April 19, 1988, I propose to keep today's prepared statement brief and to make myself available to answer any questions that you may have.

The question before you is simple: when a provision of a statute passed by both houses of Congress and signed by the President is inconsistent with a provision of a supervisory rule subsequently promulgated by the Supreme Court, which should control? Please note what is not before you: (1) Everyone

agrees that when inconsistency arises between a statutory provision and a previously promulgated Federal Rule, the statute controls. It is also clear, however, that the federal courts will strain to avoid a finding of inconsistency, and hence to apply the Federal Rule, on the theory that Congress legislates against the background of the Federal Rules and would not lightly depart from the norm of trans-substantive uniformity that they embody. (2) Similarly, everyone agrees that law made by federal judges in the course of deciding cases or controversies (federal common law) must be consistent with federal statutes in force at the time of decision (i.e., previously enacted) and that it must be revised in the light of statutes enacted thereafter. The concept of "inherent judicial power" has many meanings, depending on the context in which it is used. In the federal system, however, the room for judicial lawmaking in contravention of a statute is very small indeed. (3) Finally, everyone agrees, as 28 U.S.C. § 2071 provides, that local federal court rules must be consistent with statutes, no matter when enacted.

To assist you in considering the question that is before you, some additional ground-clearing, with specific reference to supersession, is in order.

First, supersession of statutes by court rules was an innovation when it was added to the bill that, as further refined, became the Rules Enabling Act of 1934. The Supreme Court's Equity Rules of 1912, an important model for the Federal Rules of Civil Procedure, were promulgated under a statutory

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particular interest. As explained in the Senate Report: "This bill extensively revises the bankruptcy law. Nearly all procedural matters have been removed and left to the Rules of Bankruptcy Procedure. Consequently, the need to permit the Supreme Court's rules to supersede the statute no longer exists. To the extent a rule is inconsistent, the statute will govern." S. Rep. No. 95-989, 95th Cong., 2d Sess. 158 (1978). See also H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 292-93 (1978).

Fourth, debate about the supersession issue need not, and should not, be shrouded in the obscurity of the procedure/substance dichotomy. The question under a regime of no supersession, as under the present regime, is simply one of inconsistency. We may assume that the federal courts would be as loath to find inconsistency under a regime of no supersession as they presently are when that question arises in connection with a subsequently enacted federal statute. In the face of that attitude--and in the era of sanctions for frivolous legal arguments--we may also assume that the hypothetical lawyers you have heard about would understand that satellite litigation is risky business.

Fifth, to say that the procedure/substance dichotomy and hence the validity of Federal Rules is a question analytically distinct from supersession is not to say that one can always usefully think about one without thinking about the other. As the experience with proposals to amend Rule 68 on offer of judgment demonstrates, lawmaking often involves a choice between policies that all

would agree are procedural and those that all would agree are substantive. The view one takes of the product of the lawmaking enterprise--is the provision procedural of substantive?--is likely to depend on the policies that triumph in the process. Both the House Reports on the legislation before you and Representative Kastenmeier's letter to the Chairman are eloquent testimony to the role that the existing supersession clause has played in stimulating congressional intervention in federal court rulemaking. They also establish that members of the House, who are aware that the Supreme Court has never declared a Federal Rule invalid, do not regard frequent and active intervention in the rulemaking process as a sign of its good health.

Sixth, under the current system, the rulemakers have manifested a disturbing ignorance of, or inattention to, statutory provisions that were germane to the matters before them, and it is difficult not to regard the supersession clause as a major contributing factor. As one example, in fashioning amendments to Federal Rule of Civil Procedure 11 in the early 1980's, the rulemakers ignored Congress' expressed concerns when it had amended 28 U.S.C. § 1927 in 1980. If there were no supersession, the rulemakers would be encouraged to pay close attention to existing legislation and, where it was deemed obstructive of enlightened procedural reform, to recommend its repeal.

Finally, the tendency in modern court rulemaking is toward rules that eschew policy choices in favor of broad grants of

discretion to individual trial judges. With respect to Federal Rules of that type, Congress' ability to conduct an informed review under the report and wait provisions in the Enabling Acts, a cumbersome mechanism in any event, is highly questionable. More important, I have yet to hear a good argument why such Federal Rules should not be treated like federal common law at least in the requirement that they respect Congress' policy choices.

In this light, the answer to the question before you is as simple as the question itself. You have, on one hand, the documented costs of the existing supersession clauses, none of which, after 1948, has any documented benefits. Ranged against those costs, which Congress itself has incurred, is the specter of satellite litigation - a specter without sufficient substance to sway the Judicial Conference of the United States and one whose in terrorem effect depends on unarticulated assumptions about the attitude of courts that are flatly inconsistent with the attitude expressed in numerous opinions, as well as on articulated assumptions about the behavior of lawyers that hardly do credit to the profession.

Ultimately, the question of supersession may depend on the value one places on symbols. I am uncomfortable with the messages conveyed by the existing supersession clauses. As I have suggested, one message is that the rulemakers need not be concerned about Congress' policy choices as they go about their work. A far more troublesome message is that the policy preferences of judges and their advisers, acting in a

legislative capacity but without popular mandate or all of the restraining influences of the legislative process, are entitled to supremacy when they conflict with the policy preferences of the people's representatives. Whether or not the existing supersession clauses are consistent with the formal requirements of the Constitution, they are not, at least for me, consistent with the vision of a democratic society that inspires it.

I appreciate your attention, and I am prepared to respond to your questions.

Senator HEFLIN. Mr. Richardson?

STATEMENT OF ROBERT E. RICHARDSON

Mr. RICHARDSON. Mr. Chairman, I too appreciate the opportunity to appear before this subcommittee today and to express the views of the Alliance for Justice on the removal of the supersession clause.

The Alliance for Justice, which is an association of public interest law organizations, has advocated for a number of years the elimination of the supersession clause, primarily for three reasons. First of all, the clause allows unelected rulemakers to reverse congressional decisions not only as to what might be called "trivial" procedural rules, but also as to important policy determinations. Second, the time required for Congress to review rule proposals and to monitor the rulemaking process is substantial and could probably be better used in other ways.

Finally, the supersession clause may be unconstitutional. Members of the previous panel recognize potential constitutional objections to the clause, but dismiss those objections by relying on two Supreme Court decisions. Neither of those cases supports the validity of supersession, however. The *Sibbach* case does not approve of supersession. It in fact alludes to the authority of the rulemakers to make rules consistent with statutes and not inconsistent with statutes.

Similarly, footnote 9 of *Chadha* does not approve of the supersession clause but only of the report-and-wait provision of the Rules Enabling Act. It does not even address the question of whether the rulemakers can override congressional determinations by passing rules.

I am especially concerned about the argument that was made, that because the Supreme Court avoids constitutional issues whenever possible, Congress should ignore a potential constitutional violation here. We think that Congress should instead help the Court to avoid the constitutional issue that supersession presents by removing the constitutionally suspect provision.

For the rest of my oral testimony this morning, I'd like to go back to our first objection, that Congress makes important policy decisions that should be respected by the rulemakers.

Under the Rules Enabling Act, the Supreme Court has the authority to promulgate rules of Practice and Procedure for the lower Federal courts. Some people may think of procedure as relating merely to trivial matters of form. However, as this subcommittee is aware, procedural matters also can and do have dramatic effects on very important statutory rights.

The right to a jury trial is a procedural right, but it is not something that anyone would want to disturb. Attorney fee-shifting statutes and notice of claim provisions also have procedural implications, but they still embody important policy decisions that should be left to Congress.

It should be noted in particular that for the past several years, Congress has not legislated in a vacuum but has instead acted within the framework of the Federal Rules of Procedure. Those rules have generally worked quite well in assuring that our courts administer justice fairly and efficiently.

However, where Congress has conscientiously chosen to address an issue and not to leave it to the rulemaking process, we believe that that action implies that Congress saw that issue as important, as one, if not directly affecting substantive rights, at least touching on substantive rights in a way that Congress should most appropriately address.

The question, then, before the subcommittee is, as Professor Burbank has indicated, whether in those cases where Congress has seen an issue as important enough to justify legislative action, the final determination should be governed by the act of Congress or by the action of unelected rulemakers who subsequently decide that Congress was wrong.

We firmly believe the elected Members of Congress are the proper persons to decide important issues of national policy, even if Congress' decisions in some way affect the uniformity of the Federal Rules. If the rulemakers believe that Congress has acted improperly or has come to the wrong decision, they can ask Congress to repeal the offending statute. My understanding is that Congress has been quite responsive to the requests of the Judicial Conference in matters affecting the judiciary.

Given the serious encroachment on congressional decisionmaking that the supersession clause seems to allow, those who advocate retaining the clause should be required to establish a strong justification for keeping it.

The proponents of keeping the supersession clause have instead offered only their unfounded and unjustified fears of satellite litigation. In the past, the courts have not been anxious to find conflicts between statutes and rules; and we believe that they would continue to find some way to reconcile rules and statutes in most cases. It would be very difficult to manufacture conflicts where they don't exist, and removing the supersession clause would not create any new conflicts.

However, where conflicts exist already, all that we propose is that Congress change the way in which those conflicts are resolved,

moving from a system where the rule trumps the statute, to a system where the statute prevails over the rule.

One member of the previous panel indicated that we can't know all of the conflicts that may come up between rules and statutes. I agree with that statement; we can't know everything that the rulemaking process will produce in the future. Because of that uncertainty, Congress should be especially cautious in turning over to the rulemakers a blank check to override congressional judgments. Congress should retain that prerogative for itself.

Thank you very much.

[Statement of Mr. Richardson follows:]

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE

Testimony of the Alliance for Justice on

The Supersession Clause of the Rules Enabling Act

28 U.S.C. § 2072

May 25, 1988

Prepared by

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SUMMARY OF TESTIMONY

The Alliance for Justice views the removal of the supersession clause of the Rules Enabling Act, 28 U.S.C. § 2072, as an important and necessary reform to the judicial rulemaking process. Because the clause on its face purports to allow the Federal Rules of Civil Procedure to nullify Acts of Congress, it potentially allows the rulemaking process to abrogate important policy decisions made by the legislative branch, forces Congress to spend unnecessary amounts of time in reviewing proposed rules, and presents serious constitutional questions.

As members of the Subcommittee are aware, procedural decisions can have drastic effects on the substantive rights of litigants. Especially given the broad manner in which the Supreme Court has interpreted its authority to promulgate procedural rules, these rules can conflict with congressional decisions not only about procedural matters, but also about substantive matters. Proposed amendments to Federal Rule of Civil Procedure 68 in 1983 and 1984 dramatically demonstrate how the rules could circumvent policy choices made through the legislative process. The Alliance for Justice believes that such interference with congressional enactments is entirely improper, and should be prevented by eliminating the supersession clause.

The threat of supersession also interferes with legislative decisionmaking by forcing Congress to spend substantial amounts of time and other resources in monitoring and reviewing proposed amendments to the Federal Rules. Such extensive efforts would be unnecessary if Congress were assured that its previously enacted statutes would not be subject to nullification by rulemaking.

Moreover, principles related to separation of powers strongly suggest that supersession may violate the Constitution. In INS v. Chadha, 462 U.S. 919 (1983), the Supreme Court indicated that the repeal of statutes must comply with Article I requirements of bicameral approval and presentment to the President, and that Congress cannot amend those requirements by statute. Because rulemaking does not comply with the requirements for legislation set out in Article I, it apparently cannot be used to repeal statutes.

The original purpose for the supersession clause has long since been fulfilled. Although some persons have argued that the clause remains necessary to prevent extensive "satellite litigation" over whether the Federal Rules or statutes govern in certain situations, these persons have failed to substantiate their claims. In fact, the danger of satellite litigation seems greater under the present regime than it would be if the supersession clause were eliminated.

For these reasons, the Alliance for Justice respectfully urges the Subcommittee to act to eliminate the supersession clause of the Rules Enabling Act at its earliest opportunity.

Mr. Chairman, I appreciate this opportunity to convey to you and to this Subcommittee the views of the Alliance for Justice[1] on proposed reform to the Rules Enabling Act. As this Subcommittee is aware, the procedures by which cases work their way through the federal courts can greatly affect the outcome of those cases, and in many situations may determine whether litigants can obtain justice, fairly and efficiently, within our court system.

Because of the importance of the rules of procedure in federal courts, the Alliance for Justice has long been involved in the debate and discussion concerning those rules, both here in Congress and before the Judicial Conference's Advisory Committee on Civil Rules. In particular, the Alliance has sought to assure that all persons have equal access to the federal courts, and has actively participated in efforts to reform not only the rules of procedure, but also the process by which those rules are made.

Two weeks ago, the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice reported out to the full House Judiciary Committee a bill that includes significant reforms to the rulemaking process. Title I of that bill, H.R. 3152, would establish a uniform process for promulgating various types of procedural rules, open rules committee meetings to the public, require compilation and review of local court rules, and assure the supremacy of democratically enacted policies over

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[1]The Alliance for Justice, a national association of public interest legal organizations, works to ensure that persons who have historically been unrepresented, and thus unable to secure and enforce their legal rights, have access to the judicial process.

judicially promulgated rules. Although we do not believe that these reforms go far enough in some respects,[2] we see the bill as a valuable step in improving the administration of justice in our federal courts.

One of the most important reforms contained in H.R. 3152 is the elimination of the so-called "supersession clause" of the existing rules enabling statutes. Although I will direct most of my comments to the supersession clause in the enabling statute for the Federal Rules of Civil Procedure, 28 U.S.C. § 2072, many of the same concerns apply to supersession clauses in the statutes authorizing the Federal Rules of Evidence and the Federal Rules of Criminal Procedure. See 28 U.S.C. § 2076; 18 U.S.C. §§ 3771, 3772.

Under the Rules Enabling Act of 1934, the Supreme Court was given authority to "prescribe by general rules . . . the practice and procedure of the district courts and courts of appeals of the United States" in civil proceedings. 28 U.S.C. § 2072.[3]

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[2]For example, H.R. 3152 would leave the Supreme Court actively involved in the process of promulgating rules, a role that conflicts with the Court's responsibility to decide the validity and the constitutionality of the rules if they are challenged at a later date. For a more complete discussion of this problem, see Testimony of the Alliance for Justice on H.R. 3152, Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary 3-13 (February 24, 1988).

[3]Under existing practice, proposed rules and rule amendments are first considered by the Advisory Committee on Civil Rules, which is appointed by the Chief Justice of the United States in his capacity as chairman of the Judicial Conference. When the Advisory Committee agrees upon a proposal, the Committee sends it on to the Standing Committee on Rules of Practice and Procedure, which is also appointed by the Chief Justice. If the proposal

Although it prohibited the Court from promulgating rules that abridged any "substantive right," the Act provided for the rules, upon taking effect, to take precedence over any conflicting statutes: "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072. As the House Committee on the Judiciary recently explained, this supersession clause was intended in 1934 to ensure the orderly replacement of a large number of antiquated procedural statutes that would have been difficult to identify and repeal before the first set of rules was promulgated. H.R. Rep. No. 422, 99th Cong., 1st Sess. 16.[4] The Committee concluded that, because the statutes which had occasioned the original need for the supersession clause have long since been repealed, the clause itself is no longer necessary. Id. at 16-17. See also sources cited supra note 4.

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meets with the approval of the Standing Committee, it is reported to the Judicial Conference. If approved by the Judicial Conference the proposal is submitted to the Supreme Court for consideration. Proposals approved and promulgated by the Supreme Court are transmitted to Congress and automatically become effective after ninety days, unless Congress takes legislative action on the proposal within the ninety-day "layover" period. See generally Rules Enabling Act: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 98th Cong., 1st & 2d Sess. 8-10 (1983, 1984) (statement of Hon. Edward T. Gignoux, chairman of the Standing Committee on Rules of Practice and Procedure).

[4]See also Report of the Subcommittee on Criminal Justice on Amendments to the Federal Rules of Civil and Criminal Procedure Transmitted to Congress on April 30, 1985, H.R. Rep. No. 2, 99th Cong., 1st Sess. 17-18 (1985); 133 Cong. Rec. H5337 (daily ed. June 22, 1987); See generally Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015 (describing in detail the legislative history of the supersession clause).

Although the absence of need for a supersession clause would alone seem to justify its removal from the statute, more compelling reasons also counsel in favor of eliminating the provision. In particular, the supersession clause should be eliminated because it could lead to judicial interference with Congressional policy judgments, because it forces Congress to spend an inordinate amount of time considering rules in order to protect its policy judgments, and because it is of questionable constitutionality. I will address each of these points in turn, and then discuss the objections raised by those opposed to the elimination of the supersession clause.

Interference with Congressional Policy Judgments

For the past fifty years, Congress has legislated against the backdrop of the Federal Rules. Where judicial procedure will have no effect on the substantive rights of litigants, Congress has no reason to legislate; the Federal Rules of Civil Procedure have proven quite adequate in assuring the fair and efficient processing of most claims within the federal courts. Where Congress makes a conscious choice to legislate on procedural or "quasi-procedural" matters despite the backdrop of the Federal Rules, one must assume that Congress saw that decision as impacting sufficiently upon the substantive rights of parties to justify special treatment. To assure that such decisions are not overturned by rulemakers operating with even the best of intentions, Congress should repeal the supersession clause of the rules enabling statutes.

As this Subcommittee is aware, legislative decisions with regard to substantive policy often involve a "package" of interrelated policy choices. When Congress creates a substantive right, it often includes as part of the package certain procedural provisions that further the substantive policies of the enactment. For example, when Congress passed the Jones Act in 1915, creating a right for seamen to recover damages at law for personal injury, it incorporated with that substantive right the procedural right to a trial by jury. See 46 U.S.C. § 688. In my view, Congress' primary motivation for providing the right to a jury trial in Jones Act cases was not any particular concern with the efficient functioning of the courts, but rather the perceived impact that jury trials would have on the substantive rights of injured seamen. See Schulz v. Pennsylvania Railroad Co., 350 U.S. 523, 524 (1956) (the right to a jury trial is "part and parcel of the remedy afforded" under the Jones Act).

Congress may also choose to incorporate, as part of a legislative package, certain "quasi-procedural" provisions -- provisions regulating "matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." Hanna v. Plumer, 380 U.S. 460, 472 (1965). In legislating in this "uncertain area," Congress will often make decisions on the basis of substantive policy goals, and not merely on the basis of procedural concerns. For example, when Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, it adopted a policy of

facitating the enforcement of the nation's civil rights laws.[5] Altugh one could argue that this statute is procedural in nate, in that it regulates the "judicial process ... for justly admistering remedy and redress" for violations of substantive lawsee Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941), it has had- and was intended by Congress to have -- real and specific impcations for substantive national policy.

There are many other examples of procedural or "quasi-produral" provisions that Congress has enacted in order to effct substantive policy. The requirement in some statutes, sucas the Federal Water Pollution Control Act, 33 U.S.C. § 15(b)(1)(A), that a person notify certain governmental offials prior to filing suit is not intended primarily to facitate the process of judicial consideration of claims under tho acts, but rather to allow the governmental officials to takappropriate action and possibly avert the need for a citizen sui The "notice of claim" provision of the Federal Tort Claims Act 28 U.S.C. § 2401(b), serves a somewhat similar substantive poby. Members of this Subcommittee can undoubtedly think of mar other examples in their own legislative experience. If the supsession clause is retained, these substantive policy choices cod be overridden through the relatively undemocratic

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[5]See H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976) (ppose of Civil Rights Attorney's Fees Awards Act was to give vicims of civil rights violations effective access to judicial prss, thus promoting effective enforcement of federal civil rigs statutes); S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976) (sa).

rulemaking process, a result almost certainly not intended by Congress when it passed the Rules Enabling Act.[6]

The danger of rules or rule amendments nullifying Congressional policy choices becomes even greater when one recognizes how broadly the courts have construed the scope of the rulemaking authority. As the federal courts and many commentators have noted, there is no bright line dividing "substance" from "procedure." Given this ambiguity, courts seem to have adopted an extremely broad interpretation of what constitutes a rule of procedure. See, e.g., Hanna v. Plumer, 380 U.S. 460 (1965); Sibbach v. Wilson & Co., 312 U.S. 1 (1941). Because the rulemakers apparently have a wide range within which they can promulgate rules, a similarly wide range of Congressional policy choices is subject to supersession.

In Hanna v. Plumer, 380 U.S. 460 (1965), the Supreme Court upheld Federal Rule of Civil Procedure 4 (d) (1), which had been challenged on the ground that it interfered with a state substantive policy in violation of the Erie doctrine.[7] The Court

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[6]Indeed, there is a strong argument that Congress never intended the supersession clause to have the ongoing effect of delegating to the Supreme Court the power to repeal statutes. See Burbank, supra note 4, at 1052-54 & nn.164 & 166. See also Sibbach, 312 U.S. at 9 (referring to Court's authority to make rules "not inconsistent with the statutes or the Constitution of the United States). The Supreme Court has, in dicta, assumed that the clause has a continuing effect, see Davis v. United States, 411 U.S. 233, 241 (1973), but has never decided the issue.

[7]Under the Erie doctrine, federal courts apply state substantive law, but federal procedural law, in cases arising under their diversity jurisdiction. See Erie Railroad v. Tompkins, 304 U.S. 64 (1938).

reasoned that Congress had sufficient power to establish procedural rules for the federal court system, including "a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." Id. at 472. Justice Harlan, in his concurring opinion, recognized that the Court's decision to allow "arguably procedural" rules to override conflicting state law could in many cases mean that state substantive policy would be thwarted by those rules:

> So long as a reasonable man could characterize any duly adopted federal rule as "procedural," the Court, unless I misapprehend what is said, would have it apply no matter how seriously it frustrated a State's substantive regulation of the primary conduct and affairs of its citizens. . . .
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> . . . [T]he Court attributes such overriding force to the Federal Rules that it is hard to think of a case where a conflicting state rule would be allowed to operate, even though the state rule reflected policy considerations which, under Erie, would lie within the realm of state legislative authority.

Id. at 476 (Harlan, J., concurring) (emphasis added).

Likewise, "arguably procedural" rules can conflict with federal substantive policy, and under the supersession clause the rules seem to take precedence over the substantive policy. If Congress wishes to ensure that rules do not defeat its substantive policies, it must repeal the supersession clause.

I do not mean to suggest that the rulemakers have in the past intended to usurp Congressional policymaking through the promulgation of rules. Where Congress has used procedural

requirements as vehicles for advancing substantive policy, the rulemakers have generally approached those policy choices with caution. See, e.g., Fed. R. Civ. P. 38 (expressly maintaining the right to a jury trial in all cases allowed by statute). However, recent experience also indicates that the rulemaking process is not immune to proposals that could dramatically alter important substantive policy decisions, including decisions embodied in statutes.

Probably the best examples of rule proposals that would have interfered with important Congressional policy are the amendments to Rule 68 that were proposed in 1983 and 1984.[8] Those proposals, which were seriously considered by the Advisory Committee on Civil Rules, would have significantly altered the statutory scheme for awarding attorney fees to prevailing parties in certain civil rights, environmental, and consumer cases. Under these proposals, plaintiffs who rejected settlement offers before trial and who subsequently recovered a lesser amount after trial would have been subject to liability for all attorney fees incurred by their opponents after the settlement offer.

Had either of the proposals been adopted, it would have reversed a series of Congressional judgments about attorney fee allocation in cases involving "private attorney general" statutes. For example, in the Civil Rights Attorney's Fees

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[8] See Advisory Committee on Civil Rules, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. 337, 361-67 (1983); Advisory Committee on Civil Rules, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 102 F.R.D. 407, 432-37 (1984).

Awards Act of 1976, 42 U.S.C. § 1988, Congress recognized that many persons are unable to afford counsel to vindicate important rights; it therefore provided through the Act that defendants generally must bear the attorney fees for successful civil rights plaintiffs,[9] while unsuccessful plaintiffs must bear defendants' fees only when they bring claims in bad faith.[10] The proposed amendments to Rule 68 would have overruled this Congressional policy of encouraging full vindication of civil rights by subjecting civil rights plaintiffs to the risk of liability for their opponents' attorney fees whenever a district judge determined that the plaintiffs had "unreasonably" rejected a settlement offer. Instead of paying their opponents' attorney fees only when they brought frivolous litigation, civil rights plaintiffs could have been forced to pay those fees simply because they erred in predicting the outcomes of their cases.[11]

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[9]"A party seeking to enforce the rights protected by the statutes covered by [the Civil Rights Attorney's Fees Awards Act], if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976) (citation omitted). See also Hensley v. Eckerhart, 461 U.S. 424 (1983).

[10]"[P]rivate attorneys general" should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose. Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes." S. Rep. 1011, 94th Cong., 2d Sess. 5 (1976) (citations omitted). See also Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

[11]The proposed Rule 68 amendments also point out the expansive manner in which at least some rulemakers have interpreted their mandate to develop procedural, as opposed to substantive, rules. Walter R. Mansfield, for example, indicated

It is not inconceivable that future rulemakers will similarly view changes in the Federal Rules as desirable, even where those changes could conflict with legislatively enacted policy. Although public pressure and close monitoring by Congress prevented the adoption of the Rule 68 amendments, there is no guarantee, so long as the supersession clause remains on the books, that rulemakers will not encroach upon statutory policy choices.[12]

We recognize that those persons who deal with the federal courts on a day-to-day basis may have a special expertise in determining what procedures should govern litigation within those courts. That expertise does not, however, justify Congressional abdication of its constitutional role in the legislative process. Over the years, Congress has delegated rulemaking authority to a variety of expert entities, including most notably perhaps the administrative agencies. To the best of my knowledge, however, Congress has never turned over to those agencies the power to overrule statutorily expressed policies. Instead, except for

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his belief as chairman of the Advisory Committee on Civil Rules, that the proposals would not have "abridge[d], enlarge[d] or modif[ied] any substantive right." See Mansfield, Memorandum Re: Whether the Proposed "Attorneys' Fee" Amendment of Rule 68 Complies with the Rules Enabling Act, 28 U.S.C. § 2072 (June 14, 1983).

[12]Some scholars have argued convincingly that certain existing rules encroach on Congressional enactments. See, e.g., Burbank, supra note 4, at 1193 n.763 (Fed. R. Civ. P. 83 conflicts with 28 U.S.C. § 2071); See also Burbank, Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions of Power, 11 Hofstra L. Rev. 997, 1003-04 (implying that Fed. R. Civ. P. 11 conflicts with 28 U.S.C. § 1927).

judicial rulemaking, Congress has established a framework for rulemaking and has insisted that rulemaking be consistent with duly enacted laws; Congress should begin to insist on similar consistency in judicial rulemaking.

At times, the experts may discern a need for statutory change. Where judges see the need to revise federal statutes, they may, of course, recommend changes directly to Congress through the Judicial Conference. See 28 U.S.C. § 331. Congress has generally responded promptly to recommendations of the Conference for the repeal of legislation,[13] and thus need not allow the rulemakers themselves to nullify statutory enactments.

Burden on Congress to Protect Its Policy Judgments

It might be argued that Congress already possesses the means by which it can prevent rulemaking from nullifying its earlier statutory enactments. Congress can block or modify any proposed rule of procedure by adopting legislation during the layover period, and indeed has used this mechanism on several occasions in recent years when proposed rules conflicted with policies favored by Congress.

Even though Congress has successfully blocked rules in the past when those rules conflicted with policies that it favored, the cost of doing so has been great. Because it appears to allow rules to "trump" statutes, the supersession clause forces members

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[13]For example, when the Judicial Conference criticized a series of civil priorities established by statute, Congress repealed those provisions. See Act of Nov. 8, 1984, Pub. L. No. 98-620, § 401, 98 Stat. 3335, 3356-57 (1984).

of Congress and their staffs to spend a substantial amount of time reviewing and considering proposed new rules and rule amendments in order to protect substantive policy decisions made previously. Moreover, this review process occurs before the rules are applied to actual cases or controversies, compelling Congress to consider them wholly in the abstract and making review even more difficult. Where Congress has seen fit to legislate, it is unreasonable to require such an extensive review process in order to maintain the efficacy of those legislative mandates.[14]

Additionally, reliance on the legislative process to protect prior policy judgments is ill-advised because of the many obstacles to formal legislative action. This Subcommittee is fully aware of the vagaries of the legislative process. Circumstances may prevent even a majority of the members of Congress from garnering the support in committees, the votes in both Houses of Congress, and the subsequent approval of the President necessary to block a rule with which they disagree. The supersession clause in effect places the burden on Congress to re-enact its policies when they are threatened by rulemaking; we believe that this burden more properly belongs on those who wish to change those legislative policies.

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[14]This is not to say that the "report and wait" provisions of the Rules Enabling Act would no longer be needed if the supersession clause were eliminated. Congressional review also serves as a check on rules that might violate the Constitution, exceed statutory authority, or establish unwise policy.

Constitutional Infirmities

Not only is the supersession clause bad policy in today's world, it is also probably unconstitutional under INS v. Chadha, 462 U.S. 919 (1983). In Chadha, the Supreme Court struck down the "legislative veto" provision of the Immigration and Nationality Act. Although the Court specifically distinguished the legislative veto from the "report and wait" provisions of the Rules Enabling Act, see 462 U.S. at 935 n.9, it did not voice any approval for the Enabling Act's supersession clause. To the contrary, an examination of the principles laid down in Chadha suggests that the supersession clause violates constitutional notions of separation of powers.

Because the supersession clause purports to authorize, in effect, the repeal of Acts of Congress through the rulemaking process, it appears to run afoul of Chadha's admonition that "[a]mendment and repeal of statutes, no less than enactment, must conform with Art. I" of the Constitution. 462 U.S. at 954. Obviously, the rulemaking process in no manner satisfies the requirements for legislation set out in Article I; both Houses of Congress do not enact the rules, and the rules are not presented to the President for his approval or veto.

For statutes in existence in 1934 and subsequently superseded by rules, one could perhaps accept that Congress itself effected their repeal when it enacted the Rules Enabling Act. However, one must question how Congress could, in 1934, repeal statutes not then in existence. Congress cannot amend the

"explicit prescription for legislative action contained in Art. I," 462 U.S. at 958 n.23, and thus it could not have in 1934 delegated to the Supreme Court and the rulemakers the authority to repeal statutes. Neither can Congress properly enact rules by failing to pass contrary legislation during the layover period. As the Court noted in Chadha, "To allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I." One must assume that Article I also bars Congress from enacting judicial proposals into law by mere silence.

Some have argued that the Chadha analysis may be inapplicable to judicial rulemaking, because the courts have an inherent power to regulate judicial procedure and thus do not need to rely on a delegation of authority from Congress to promulgate rules of procedure. While courts may have some inherent power to regulate their own procedures, it is quite doubtful that any such power extends so far as to override statutory policy. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 597-609 (1952) (Frankfurter, J., concurring) (noting that, whatever inherent authority the President might have had in the absence of legislation, he did not have authority to seize private steel mill where Congress had prohibited such action). Indeed, courts have often conceded that under Article I, "Congress has undoubted power to regulate the practice and procedure of federal courts," Sibbach, 312 U.S. at 9-10, and they have never indicated that this Congressional power is in any way

limited by an inherent judicial authority. Thus, although the inherent authority argument may provide a subject for debate among legal scholars, it does not provide much support for the constitutionality of a supersession clause.

Arguments for Retaining the Supersession Clause

Given the strong policy and constitutional reasons for eliminating the supersession clause in the Rules Enabling Act, proponents of the clause would need especially strong reasons for retaining it. The primary objection to elimination of the supersession clause, however, seems to be based on some perceived threat of "satellite litigation." Those arguing for retention of the clause claim that if the supersession clause is eliminated, lawyers will race into court with volumes of obscure statutes that purportedly conflict with various rules in an effort to overcome the operation of those rules. These persons have not indicated what statutes might be used to override the rules, however, and have produced no evidence whatsoever that elimination of the supersession clause would lead to any additional disputes over the relationship of statutes and rules.

In the fifty years of experience under the Federal Rules of Civil Procedure, relatively few conflicts between the rules and statutes have emerged. Presumably, in our adversarial system of justice, as many litigants would attempt to avoid the operation of unfavorable statutes by invoking the supersession clause as would attempt to avoid the operation of unfavorable rules if the clause were eliminated. Changing the law from "rule

preeminence" to "statutory preeminence" will not create any new conflicts, but will only alter how those conflicts are resolved. So long as the law is clear and unambiguous, one should expect no increase in the litigation over whether a rule or a statute provides the basis for decision. In fact, elimination of the supersession clause may actually reduce the amount of satellite litigation, because if the rulemakers' authority extends only to rules not in conflict with federal statutes, they will exercise caution to avoid promulgating rules in excess of that statutory authority.

If there are obscure statutes whose application in lieu of certain Federal Rules could benefit certain litigants, it is quite likely that a challenge to those Rules would already have emerged. If litigants are indeed ready to manufacture conflicts between rules and statutes in order to avoid the operation of the rules, that option is already available; they can argue that the statute applies because the Rules Enabling Act was never intended to have a continuing supersession effect, see supra note 6, or that supersession is unconstitutional. See supra pp. 14-16. Despite the availability of these arguments, there has been no flood of litigation aimed at avoiding the Federal Rules, and no one has substantiated in any way the claim that such a deluge will engulf the courts if the supersession clause is eliminated.

With no evidence of any continuing need for such a provision, we strongly urge this Subcommittee to work for the repeal of the supersession clause of the Rules Enabling Act. In

a representative democracy, the people have a right to expect that important policy decisions made by their elected representatives will not be struck down unless those decisions violate constitutional principles. The supersession clause, however, ignores that right by allowing a small group of unelected rulemakers to alter or even to nullify Congressional enactments. Furthermore, the clause infringes on the rights and needs of Congress, which must continually guard against potential encroachment on its previously enacted policies, draining time and other resources from its efforts to solve the pressing problems of today. The supersession clause does a disservice even to the judicial branch, which, by entering so far into the legislative realm as to repeal or nullify statutes through rulemaking, loses a measure of the neutrality and impartiality necessary for its effectiveness. Together with the constitutional questions that the clause presents, these problems advise the repeal of the supersession clause at the earliest opportunity.

In closing, I would like to express my appreciation for the Subcommittee's interest in improving our judicial system, and for the opportunity to convey the views of the Alliance for Justice at this hearing. I hope that our comments will prove helpful.

Senator HEFLIN. In this matter, of course, the old saying comes up, if it ain't broke, don't fix it. Do you have any examples of where some injustice has arisen as a result of the supersession clause?

Professor BURBANK. It depends upon how you define "injustice." I believe—and Representative Kastenmeier and other Members of the House of Representatives agree—that the existence of the supersession clause has caused Congress to intervene more in the rulemaking process than they think is appropriate. I count that as a not insubstantial cost. Whether it is an injustice is another question.

As an example of a case in which a rule was promulgated that in my view overturned a policy judgment made by Congress—and because of the supersession clause it prevails—I would cite you the example of 28 U.S.C. 1927, authorizing the imposition of sanctions on lawyers for engaging in vexatious litigation tactics.

When Congress amended that statute in 1980, after very careful consideration by both the House and the Senate—there was a conference committee on that provision—it was part of an antitrust bill, but it is more broadly applicable—when Congress amended that provision in 1980 so as to permit an award of attorneys' fees as part of the sanction for this vexatious conduct, it specified that what it understood to be the standard for finding a violation of section 1927, which required very egregious conduct on the part of the lawyer, should not be changed because of its fear that, if it changed the standard, that would deter lawyers from acting legitimately in the zealous representation of their clients.

Rule 11 of the Federal Rules of Civil Procedure as amended in 1983 requires nothing like the level of egregious conduct in order to have an imposition of a sanction on a lawyer.

The fact is, however, that the people who wrote amended rule 11 weren't aware of the congressional deliberations in 1980. They were aware of section 1927, but I know from personal conversations and from a highly critical analysis I did that prompted them, that they simply weren't aware of what Congress had done. And the reason I suggest they weren't aware is because they didn't have to care about it. If Congress had done something inconsistent previously, so what? The supersession clause will take care of that.

The example that you will hear most prominently, of course, is rule 68. That never happened. The rulemakers would like us to think that it didn't happen because the new rulemaking process was working. I would suggest, and I believe that Representative Kastenmeier would agree, that the reason it didn't happen is because a lot of people in the House of Representatives put a tremendous amount of pressure on the rulemaking establishment to stop that rulemaking effort from going forward.

It is also the case that the chairman of the advisory committee changed, and the reporter changed.

Senator HEFLIN. Mr. Richardson, in these days of computerized literature searches, I have no doubt that the task of identifying in advance statutes that may be in conflict with a proposed rule is much easier and more effective than in the 1930's, when the supersession clause was first enacted.

However, I am struck by a study mentioned in an October 1985 letter from Prof. Charles Wright to Representative Kastenmeier. Evidently, the study found that no more than 20 percent of the relevant documents will be identified in a full text literature search of legal documents.

If we repeal the supersession clause, what happens to those statutes that are not identified in advance?

Mr. RICHARDSON. Mr. Chairman, I believe that there will be relatively few of those statutes for two reasons. First, Congress in 1948 extensively revised the Judicial Code and eliminated these procedural provisions that could have created potential conflicts in the future.

Second, and probably more importantly, Congress doesn't pass that type of provision much anymore; instead, Congress relies on the rulemaking process to handle the day-to-day administration of the judicial process and intervenes only where it considers the matter sufficiently important to justify a different approach.

Congress continues to support the notion of uniformity of Federal Rules and does not interfere with that uniformity lightly. And because of that, I don't see this problem of identifying and coming up with a list of procedural statutes as being crucial.

Those persons who practice in a given area of law should be aware of any statutes that might conflict with rules.

Professor BURBANK. Might I supplement that, Mr. Chairman?

The Supreme Court and the lower Federal courts have articulated as a rule that they will not lightly find an inconsistency between a Federal Rule of Civil Procedure, for example, and a subsequently enacted statute. And you remember that when there is a conflict between a Federal rule and a subsequently enacted statute, the statute controls. They will not find a conflict unless they can find clear evidence that Congress intended to displace the rule. So that is another reason why you are not going to find many conflicts, because the Federal courts are not going to reach out to find conflict; on the contrary, they are going to strain to avoid it.

Senator HEFLIN. Well, thank you very much. We appreciate your testimony.

Senator Thurmond has a statement that will be entered into the record, and he has some questions that he would like to submit.

[Statement of Senator Thurmond follows:]

STATEMENT BY SENATOR STROM THURMOND (R-S.C.) BEFORE THE SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE. REFERENCE, HEARING ON S.2274, A BILL TO AUTHORIZE AND ENCOURAGE FEDERAL AGENCIES USE OF ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES. ROOM SD-226, WEDNESDAY, MAY 25, 10:00 A.M.

MR. CHAIRMAN:

Today we are here to consider testimony regarding S.2274, a bill to authorize and encourage Federal agencies to use mediation, conciliation, arbitration and other means of alternative dispute resolution (ADR) for the prompt and informal resolution of disputes.

Recently, there has been an increase in agency litigation, coupled with complex rules, regulations, and procedures which must be followed. The diversion of agency time and energy due to increased litigation is a loss which cannot be easily measured. Statistics show that federal agencies are involved in hundreds of thousands of disputes annually. The administrative office of the U.S. courts estimates that for the year ending June 30, 1987, 30 percent of all civil cases commenced involved the United States as a party. That figure amounts to over 72,000 actions which must be resolved.

Alternative dispute resolution has been used in the private sector for many years and should be carefully considered as a workable option. As well, in 1987 there were 275 ADR programs of various types in existence in over 40 states.

In summary, no one can dispute that this proposal has the potential to reduce the cost of law suits against government agencies. The reduction of costs is in the interest of both the government and the taxpayers of this Nation. Although some of the provisions of this legislation must be studied to be sure they are workable, the concept embodied by this bill could reduce the burdens on courts, agencies, and the economy.

I look forward to the testimony of those in attendance here today.

Senator HEFLIN. There may be some additional questions submitted to the panels that have testified today.

Thank you very much.

Professor BURBANK. Thank you, Senator.

Mr. RICHARDSON. Thank you, Senator.

[Whereupon, at 12:17 p.m., the subcommittee hearing on the Rules Enabling Act was concluded.]

APPENDIX

WRITTEN STATEMENT OF THE
AMERICAN COLLEGE OF TRIAL LAWYERS,
IN LIEU OF TESTIMONY, IN OPPOSITION TO
THE PROPOSED AMENDMENT OF THE
"SUPERSESSION CLAUSE" OF THE RULES ENABLING ACT

May 25, 1988

The American College of Trial Lawyers herewith submits its statement, supplementing its letter of January 21, 1988, to Senator Heflin, in opposition to the proposed amendment of the so-called "supersession clause" of the Rules Enabling Act. The College has considered the various proposed amendments to the Rules Enabling Act set forth in H.R. 1507, 100th Congress, and it takes no position on any of these proposals except as to the revision of the supersession clause.

The American College of Trial Lawyers is an organization of experienced practitioners in the state and federal courts. It has been in existence since 1950. Fellows of the College are admitted by invitation only, and the College constantly strives to assure that only those who have achieved excellence in the field of civil or criminal trial work become members. Membership is limited to a maximum of 1% of those admitted to the bar in any state or (Canadian) province. No one is eligible until he or she has completed at least 15 years' active trial practice. The College thus comprises the leaders of the trial bar.

Matters relating to the efficient, expeditious and fair processing of litigation in the federal courts have always constituted a high priority for the American College of Trial Lawyers. Its committees constantly monitor the effectiveness of the rules of practice, procedure and evidence as they are administered in the federal courts. The College keeps abreast of the work of the Advisory Committees to the Judicial Conference and has always made its positions known to the Judicial Conference when amendments to the rules are being considered. The College, from time to time, will itself propose needful amendments.

Thus, for the 38 years of its existence the College, and its Fellows, have had day-to-day experience with the rules and the rule-making process in the federal courts. The view of the College is that the system is working well.

The particular proposal which the College addresses in this statement is the provision which would revise the supersession clause. The pertinent wording of 28 U.S.C. §2072, concerning rules passed by the Supreme Court and submitted to Congress under the Rules Enabling Act procedure is: "Such rules shall not abridge, enlarge, or modify any substantive right..." and "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." It is proposed that that language be amended to state:

> (b) Such rules shall not abridge, enlarge, or modify any substantive right or supersede any provision of a law of the United States except any rule of practice or procedure or evidence--
>
> (1) in effect on the day before the date of the enactment of the Rules Enabling Act of 1987;
>
> (2) prescribed under this chapter; or
>
> (3) consisting of an amendment made by an Act of Congress to a rule described in paragraph (1) or (2) of this subsection.

The College opposes this amendment. The statute should stay as it is.

The present supersession clause, passed in 1935, was necessary in order to achieve consistency and efficiency in the handling of litigation in the federal courts. Without such a clause the practitioner would be, and indeed was already, faced with numerous conflicting methods of prosecuting or defending claims in the United States courts. The various kinds of claims or adjudicatory matters processed by the courts could have totally different procedures provided for their handling, depending upon what procedural requirement might have been imposed when Congress legislated in the particular area at issue. Who must receive the original process, should the complaint be verified, how much time does the defendant have to answer: these and dozens of similar questions could vary, depending upon the case. If unchecked this obvious confusion could lead to chaos as judges and practitioners alike attempted to keep track of the conflicting requirements.

As the College understands the working of the rule-making process since 1935, these problems have been completely, or at least substantially, eliminated. When the Federal Rules of Civil Procedure were enacted in 1938, there was thereby created a uniform set of practice and procedure rules applicable in the federal courts. These rules could not abridge substantive rights, and there would continue to be an area between "substance" and "procedure" which might, from time to time, require interpretation by the courts. There has been very little litigation over that question. By virtue of the supersession clause of the enabling act, the numerous conflicting, purely procedural, statutory requirements to be found as of 1938 were rendered toothless. The federal rules brought consistency and efficiency to federal litigation.

In the view of the College, that need did not dissolve after 1938. The Federal Rules of Civil Procedure must be ongoing and living tools for the use of judges, lawyers and litigants. As new rules get enacted or existing rules get substantially revised, there is a need, similar to the need felt in 1935, to establish the priority of these provisions over old statutes which may conflict with them. To believe that order was irreversibly wrought out of chaos in the 1930s, such that there is no occasion to continue to protect the efficiency which the 1938 rules conferred on the courts,

is to be short-sighted. The weeds will gradually spring up in the garden and some future Congress will have to enact a new "supersession clause."

That is the evil which the College perceives in the proposed revision. What would be superseded under the new clause would only be earlier versions of the Federal Rules themselves. From the effective date of this new clause on into the future, any further expansions or amendments to the formally adopted rules of practice, procedure or evidence would be effective only insofar as they avoided conflict with some contrary provision buried someplace in the United States Code. Some litigants, unhappy with the impact of a new rule on their cases, would be inclined to search for conflicting statutes; indeed, they might be tempted to create conflicts where others might not readily see them. The effort might then be expanded to encompass an argument that their right to be free of the inconvenient new restriction should be deemed "substantive" in any event and thus beyond the reach of rule-making.

Such satellite litigation is not conducive to orderly proceedings. Under the present statute parties are not tempted to seek out or manufacture "conflicts" because even if the preexisting statute does conflict with a new rule, to that extent it is of no force or effect. The existing version of the supersession clause has had a welcome dampening effect on this particularly sterile variety of litigiousness.

In sum: the present supersession clause has worked well. No substantive rights have been abrogated. The clause has spawned remarkably little controversy. Instead, it has brought to the federal courts that degree of order and consistency which is needed if justice is to thrive in practice as well as in theory. There is no need to amend this clause. There is ample reason to leave it alone.

Respectfully submitted,
AMERICAN COLLEGE OF TRIAL LAWYERS

By Morris Harrell
President

STATEMENT OF PAUL D. CARRINGTON

SENATE JUDICIARY COMMITTEE

RE: PROPOSED DELETION OF SUPERSESSION PROVISION BY THE RULES ENABLING ACT AMENDMENTS OF 1988

May 25, 1988

I am a Professor of Law at Duke University and have taught Civil Procedure at Duke and at other law schools since 1960. I have maintained an active interest in procedural law reform for at least 25 years. I have had the honor since 1985 to serve as Reporter to the Advisory Committee on the Civil Rules, but I hasten to emphasize that I do not speak for that committee, or for any of the institutions to which that committee gives advice. I write only as a single observer of the proposed legislation. I do so in response to a request from the staff of the Subcommittee and as one whose experience has afforded an opportunity for observation that may be useful.

I will first comment generally on our fifty years of experience with the rulemaking process, especially insofar as that experience bears on the issue of the supersession provision which the proposed legislation would restrict. I will then try to explain the meaning and significance of the present supersession provision as I understand it. I will not draw any conclusion on the wisdom of the proposed revision, in part because I serve the Judicial Conference of the United States, which has voted to take no position with respect to the issue, and also because my own individual opinion, which is all that I could provide, should have no particular weight in your delibera-

tions, especially so because I may be perceived to have a personal interest in the matter. Because my role is thus limited, I have chosen not to burden the Subcommittee with an appearance at the hearing, and beg the Subcommittee to accept this written statement for whatever use it may have.

The Rulemaking Process

The Advisory Committee on Civil Rules which I serve has a distinguished tradition dating from the time of its first appointment by the Chief Justice of the United States in 1935. The present membership of the Civil Rules Committee includes two United States Circuit Judges, three United States District Judges, a United States Magistrate, one state court judge, a representative of the Justice Department, two law professors, and two members of the private bar.

The Committee drafted the Civil Rules adopted in 1938 and has since served to refurbish those rules from time to time in light of changing circumstance. The aim of the Civil Rules Committee was and is expressed in Rule 1: "to secure the just, speedy and inexpensive determination of every action." In pursuing that aim, the Committee follows in a tradition of procedural law reformers that includes Roscoe Pound, David Dudley Field of New York, Henry Brougham of the English Parliament, Jeremy Bentham, the English legal philosopher, and unnumbered others who have labored in pursuit of this elusive goal, including very notably the distinguished chairman of this Subcommittee.

The lofty aim of the Committee's work is politically unifying. Almost no one opposes justice or dispatch or economy in litigation, at least until the disposition of their own disputes is made the subject of specific attention. Surely no one loyal to democratic legislative institutions can doubt that effective adjudication of claims brought pursuant to the statutes you enact is critically important to the effectiveness of the legislative branch as policy maker. There is little use in your efforts to make laws if the courts that enforce them are erratic, dilatory, and costly beyond the worth of the rights you create. It is therefore of paramount importance to the work of this Congress and the achievement of its aims that the aims of the rulemakers be served. Rulemakers are your servants, not your rivals.

As most and perhaps all members of this Subcommittee know, the Civil Rules Committee is at the base of a rather lengthy ladder which must be climbed before an amendment to its Rules can become law. Even for the most technical of amendments proving to be wholly uncontroversial, the process of amendment requires at least three years. During that time an amendment will be reviewed by many groups, including no fewer than five that have an official role to play in approving an amendment before it becomes law.

Rules amendments commence with suggestions made to the Civil Rules Committee. These may come from members of the Committee or even the Reporter, but most are initiated by judges, lawyers, or law professors. Now under study is one proposal that comes to us from a United States Senator, and another from a member of the

House. At the present time, about forty possible amendments are in various stages of consideration. Every one of these, as it happens, was initiated by a suggestion coming from outside the Committee. The Committee considers with some care every suggestion that is made directly to it, and some that appear in published literature.

Some suggestions are, to be sure, summarily discarded by the Committee as inappropriate to court rulemaking or manifestly unwise. Others are temporarily set aside as untimely. Some are referred to Congress. In every case in which a suggestion is taken under study, the Civil Rules Committee invests substantial effort in relating the proposal not only to the text of the rule directly involved, but also to other provisions of the federal civil procedure which form an integral whole. The Civil Rules Committee then prepares a text of a proposed rule change which is congruent with the existing and evolving system.

In considering amendments, the Civil Rules Committee has access to the services of the Federal Judicial Center, which can sometimes provide powerful light based on empirical study. The Committee also has access, of course, to a substantial body of professional writing on its subject; there are several hundred law professors in the United States having a primary interest in Civil Procedure who form a substantial critical audience for the professional work of the Committee, as well as a source of ideas. Civil Rules Committee drafts and even Reporter drafts of proposed rule changes are thus circulated to law professors, and also to bar organizations maintaining a continuing interest in judicial

law reform. The Reporter carries on a substantial correspondence on behalf of the Civil Rules Committee with judges, lawyers, and scholars having an interest in the effectiveness of our judicial system. On occasion, also, the Reporter meets with interested groups such as the federal courts or federal rules committees of state and local bar groups to discuss proposed amendments.

The deliberations of the Civil Rules Committee are now open, and are occasionally attended by members of the public having an interest in its work. Any proposed recommendations are published for public comment, and are now the subject of public hearings held in several locations. If proposed amendments are finally approved by our Committee, they are forwarded to the Standing Committee on Rules for its consideration. That Committee often has suggestions for further improvements in the texts of proposed amendments and sometimes rejects recommendations of the Civil Rules Committee. If, however, a recommendation is approved by the Standing Committee, it is forwarded to the Judicial Conference of the United States for its possible approval. A recommendation approved by the Judicial Conference is transmitted to the Supreme Court for promulgation. So far, the Supreme Court has promulgated every rule change recommended to it by the Civil Rules Committee and the Judicial Conference, although not without dissents on several occasions.

In conformity with present law, Federal Rule changes are not effective until they have remained "on the table" of Congress for the prescribed period, so that Congress has an opportunity to oversee the work of judicial rule-making. In 1983, for better or

worse, the Congress did reject a recommendation of the Civil Rules Committee and enacted its own draft of an amendment to Rule 4. More frequently, however, the Congress has passively acquiesced in the promulgation of Civil Rules amendments. This passivity has reflected in part a benevolent self-restraint on the part of Congress. It also reflects the fact that in fifty years, the Supreme Court has never placed on the table of Congress any amendment to the Federal Rules of Civil Procedure which was expected by the advisory committee recommending it to evoke substantial political opposition, or even substantial political interest.

Theory in Federal Rulemaking

That this is so is a reflection of the aims and the theoretical underpinning of the Civil Rules. The aims, as I have noted, are to make civil proceedings "speedy, just, and inexpensive," aims which do not evoke disharmony. Opposition must come if at all from concern over the means by which the universally approved aims are pursued.

There are at least two related characteristics of the Civil Rules which partially explain why amendments tend not to be the subject of intense political interest. One is the characteristic of general applicability; the second I will describe as loosely textured drafting.

General Applicability. By the terms of the Rules Enabling Act, court rules must be "general." Federal Civil Rules are therefore never brought into play by the specific substantive

nature of a claim or defense that may be the subject of dispute. This is not to say that every rule is universally applicable to every matter arising in a federal court. Some of the Civil Rules do have specific exceptions such as "unless the laws of the United States otherwise provides," and a few have been interpreted to have implied exceptions such as being applicable in different ways to proceedings brought into a federal court on the basis of diversity of citizenship of the parties to which state law is generally controlling. But allowing for such exceptions, it can be said that no Civil Rule is written to apply to any specific category of cases, nor is any amendment ever seriously considered with a specific substantive category of cases in mind.

In 1947, in Hickman v. Taylor, the Supreme Court emphasized this feature of the rules in explaining discovery: "Discovery . . . may work to the disadvantage as well as to the advantage of individual plaintiffs. Discovery, in other words, is not a one-way proposition. It is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant."

This feature of modern Anglo-American procedure is about a century older than the Federal Rules and is derived from centuries of adverse experience with category-specific procedures. The teaching of that adverse experience is that the complexity resulting from categorical differentiation in procedural law used in courts of general or broad subject matter jurisdiction produces wasteful dispute as to which is the controlling set of procedural rules.

There are at least two additional reasons for our preference for procedure rules of general applicability. One is that substantive categorization narrows the professionalism of both advocates and judges, who tend to become specialists to one category and aliens to others. There is a widely shared sentiment in the bar of this country that we should do what we can to constrain the modern tendency to narrow specialization. A second reason is that substance-specific procedures tend to be less satisfactory to the parties because they imply a lower order of neutrality on the part of the court. A court equipped with a special procedure designed to deal with a particular class of litigants seems less suited to the posture of disinterest which we still expect our courts to maintain. Thus, for several entrenched reasons, and perhaps others, constant effort is made to avoid the creation of special procedures for special classes of cases.

This characteristic of modern procedure tends to reduce political interest in procedural rule-making for the familiar reason that what is everyone's business is seldom on anyone's political agenda. As Senators will be the first to know, our political system is far more responsive in more narrowly defined matters where political adversaries can perceive that their particular interests are at stake. As long as the rulemakers achieve the level of generality of applicability that contemporary theory prefers, they are unlikely to encounter a high level of political interest.

And, indeed, the appearance of significant political activity with regard to a proposed rule or amendment by a group having common interests that are extrinsic to the judicial system is generally taken by rulemakers as a signal that the rule or amendment is unsound, perhaps not "just" in the sense meant by Rule 1, and at least unsuitable for promulgation as a rule of procedure. Thus, some Senators may recall that just a few years ago the Civil Rules Committee did publish two drafts of amendments to Rule 68. The aim of those amendments, no one can reasonably doubt, was to make federal litigation more "inexpensive," again to use a Rule 1 word. But concerns were aroused that the kinds of changes being considered in Rule 68 might diminish the effect of the Civil Rights Attorneys' Fees Act of 1976 and perhaps other fee-shifting legislation. Whatever the possible merits of a reform of Rule 68, concern of this kind was ample reason to abandon any effort to effect such a change, and no proposal of an amendment ever came forth from the Civil Rules Committee. The matter was permanently tabled.

More recently, to take a less familiar example, the Civil Rules Committee has been importuned to devise special pleading rules in cases arising under the civil liability provisions of the RICO Act. These suggestions have been summarily discarded by the Committee because they would require a categorical application, thus violating the principle of general applicability, threatening the values which I have just identified, and exceeding the authority of the rulemakers under the present Act.

The impulse to political neutrality of procedural rulemaking was expressed in the 1934 Act not only in the requirement that rules be "general," but also in the process established for making those rules. The process established by the Act conferred responsibility for procedural rules on the Supreme Court rather than on conventional legislative committees with the expectation that the Court would delegate the primary duties to a committee of technicians having no democratic political status or constituency, and thus no possible qualification to draft categorically specific rules. That the rulemaking process would have proved over fifty years to be something of a political Milquetoast timidly avoiding matters of political meat would not likely have been much of a surprise to those who initiated our system in its 1934 form. Rather it would have fulfilled their hopes and expectations.

Loosely Textured Drafting. A related characteristic of rules that come forth from the Civil Rules Committee is that much is left to the intelligence and wisdom of the District Judges in the specific application of the rules to the varied circumstances arising in litigation in their courts. Often this is explicit in the text of a rule which confers discretionary power on the judge. Sometimes the discretion or flexibility results from a diction that is consciously open-ended, leaving space for interpretation at the point of application. Some looseness in the rules is associated with their brevity; while there is an endemic tendency to make the rules longer, they are still far too brief to address a myriad of issues of detail.

This characteristic is derived from considerations similar to some of those animating our preference for procedural rules of general applicability. Elaborate procedural rules which are carefully designed to prevent our judges from making errors can become themselves centers of costly dispute which distract the decision-making process away from the substantive merits of cases to focus on possible procedural missteps by lawyers or judges. Even one who is imbued with strong mistrust of individualized power of the sort exercised by our District Judges is ultimately confounded in the desire to channel and constrain judicial discretion by our unhappy experience with elaborate procedures rigorously enforced, which result in countless dispositions of cases which never reached the merits. In the end, the best that we can do to facilitate effective enforcement of the laws you make is to give our judges simple but sturdy tools with which to expose the merits of disputes, and then to hope and expect that their craftsmanship will be adequate to the tasks you set. With this view in mind and in keeping with widely shared expectations, every rule or amendment sent to the Supreme Court for promulgation has had play in the joints, leaving considerable room for our District Judges to make sense of our procedural system in light of needs presented by cases at hand.

One consequence of this approach is further to reduce the level of partisan political interest in procedural rules. A body of law that reflects no political agenda, has no apparent special consequence for any substantive interest group, and merely equips our courts to do their work largely according to their own lights

is not the material of which political controversy is generally made. Thus it is that no Civil Rule or amendment to a Civil Rule finding its way up the rulemaking ladder has ever evoked political activity by any group organized around an interest extrinsic to the procedural system. Nor is it likely, or even imaginable, that such an amendment would move through the existing system in the absence of drastic change in the premises from which all of our procedural rulemaking proceeds.

To put this characteristic of loose texturing of our procedural rules in perspective, I should advert to two indirect consequences. One is to facilitate the categorical integration of substance and procedure through court-made law. While our formal procedural rules rigorously adhere to the principle of general applicability, they are sufficiently flexible to permit a degree of adaptation to the needs of specific classes of cases in light of substantive aims discerned from the texts of controlling legislation. As the courts struggle with the help of parties and counsel to give effective application to your statutes, procedural rules do sometimes take on subtly different contextual meanings. In this respect, the loose-texture approach provides balance to the characteristic of general applicability which might otherwise tend to produce a procedural system that is too rigid to be effective in widely varied circumstances. It thus helps to achieve the goal of making procedure servant to substance.

A second indirect consequence is more speculative. But it does appear that over the last fifty years, there has been a

significant unplanned growth in the role of the United States Courts of Appeals in the review of procedural rulings by United States District Courts. The "final decision" requirement adopted by the Congress for those appellate courts when they were established in 1891 did for a time mean that many and perhaps most procedural rulings were never ripe for review. The 1938 Rules, by providing district courts with sturdier tools and general principles for their use, may have been a cause for the development of court-made exceptions to the final decision requirement which expose a larger proportion of procedural rulings to the prospect of appellate review. In this way, the enlargement of discretion seems to have begotten an enlargement of constraints on that discretion, a factor to be weighed in assessing the effects of the Federal Rules. The result is a procedural system that is quite flexible, but not arbitrary.

Finally with respect to the loose texturing of the Civil Rules, I should note the relationship to the development of Local Rules, a development which is an important subject of this legislation. Local rulemaking has burgeoned as the number of district judges in each district has grown; partly in response to the bar, the district courts have frequently felt a need to standardize their exercise of the discretion conferred by the loosely-textured Rules and have therefore created sometimes elaborate local rules and standing orders. To some extent, this kind of local rulemaking cuts against the theoretical grain of the Civil Rules and may, on that account, need to be constrained. As I have stated, an aim of civil rulemaking has been to avoid

procedural confinements which unduly distract the judges from the task of applying the law to the facts. On the other hand, it is not my impression that local rules are often used to dispose of cases that would otherwise proceed to resolution on the merits. While they may be an unwelcome burden to lawyers, especially those who practice in multiple districts, it does not appear that local rules have defeated the aim to keep the Federal Civil Rules loose enough to permit accommodation by judges to specific cases.

Evaluation of Rule Making

Consideration of significant amendment of the Rules Enabling Act is an occasion to make an overall assessment of the process and its product, the Federal Rules of Civil Procedure as amended over the past half century.

As the House Committee Report accurately portrays, there have been occasional rumbles about the process. It has sometimes appeared that the process may be too ingrown, a concern that is addressed in the present bill.

Moreover, no knowledgeable person would claim that the Civil Rules have achieved their aims of establishing a process that is "speedy, just, and inexpensive." There are many shortfalls in performance. The architects of 1938 did not foresee the keeping of voluminous business records dictated by the Internal Revenue Code and our numerous regulatory schemes; nor the rise of the expert witness; nor the invention of the computer or the cathode ray tube; nor the universalization of hourly billing rates by law firms; nor the growth of law firms to the size of small private

armies. All of these developments and others have contributed to make contemporary federal civil litigation too costly. Moreover, as we must expect in light of our adversary tradition, attorneys carefully exploit the resulting weaknesses in the system, turning them if they can to unjust advantage of clients. In response, the system has moved to the managerial style of judging and to the controversial device of sanctions under Rule 11. Indeed, the unaccepted proposals regarding Rule 68 were suggested as a response to widely perceived deficiencies in contemporary practice said to result in economic waste. But managerial judging and Rule 11 and all else that has so far been tried has not provided adequate correction, and each of the correctives has independent costs of its own. The deficiencies of the process are now sufficiently well-recognized to have begotten the large scale reaction that is the movement to alternative dispute resolution, a movement reflecting the widely shared sentiment that litigation is too expensive. The Federal Civil Rules may have contributed to this situation of dissatisfaction, and I must certainly concede that the Rules have not prevented its development.

Before concluding, however, that the rulemaking system is a failure, two points need to be considered. One is that the aim of "speedy, just, and inexpensive determination of every action" is highly idealized. The problems faced by any procedural system are ubiquitous, enduring and intractable; not only is perfection unattainable, even excellence is unstable because of changing circumstances and the corrosive effect of perpetual exploration

and exploitation of systemic weakness by parties. Thus, one reason for our dissatisfaction with contemporary federal practice is that our expectations are very high in relation to what is attainable. A quick look around the world reveals some legal systems that can make reliable decisions with greater economy and dispatch than our own, but their number is not great, and many of them are set in political contexts far simpler than our own, in which far less is expected of the legal system.

The second point is that there is no legal system in the world that is nearly so effective as the courts of the United States in enforcing the laws of the sovereign legislature. There are additional reasons why this is so, including several minor ones to be found in the text of the Civil Rules, but two significant reasons are the discovery system established in the 1938 Rules and the class action device as amended in 1966. If our courts are sometimes less speedy and less inexpensive, they are almost always closer to the reality of events in dispute than are those systems which are notably speedier and less expensive. In no other country in the world will citizens so frequently receive the sound professional advice that if they engage in conduct forbidden by the national law, they will very likely be found out, if not by the government, then by individuals who have been harmed, and, as a result, they will be compelled to compensate not merely a few aggressive individuals willing to invest treasure and heartache in litigation, but the whole population of persons intended to be protected by that national law. In this important respect, this legislative body can speak with greater

authority and effect than any other legislative body in the world.

Indeed, a useful comparison should be made as well to our national experience with the administrative process. If this body were now considering a new law to protect the environment, or investors, or consumers, or minorities, or managements threatened by hostile takeovers, or any other group of constituents, it would think first not of an administrative remedy to a problem, but of remedies that can be provided through civil litigation in the federal courts. The opposite would have been true in 1938, and the change reflects a major development in our polity, one in which the Federal Rules have played a role.

Also useful is a glance at state court systems, many of which have emulated the federal rulemaking process, partly perhaps on the basis of a perception that this sort of rulemaking is a source of legislative strength.

Seen in these lights, the federal rulemaking system could be appraised more positively. The Senate could reasonably view the Rules Enabling Act as an important accommodation in our constitutional scheme, a subconstitutional structure designed to increase the long term effectiveness of the federal courts and thus of the legislative branch as well. Like everything else in our government, it is a complex, and perhaps a delicate structure. Because its consequences are longer term, radiate in many directions, and inter-relate to numerous other institutional arrangements, it is not easy to foretell the results of a significant change in the Act.

Supersession

I turn then to the specific subject of these hearings, the proposed revision of the supersession clause, or sentence, which as it presently appears in Section 2072 of Title 28 reads: "All laws in conflict with such rules shall be of no further force and effect after such rules have taken effect." The proposed revision would allow a Court-made rule to supersede legislation if, but only if, the enactment were denominated a rule of court.

Interpretation of the Supersession Provision. A point that I can perhaps usefully make is that the present supersession provision is extremely narrow in its application. Its narrowness can be discerned from a close reading of the text of the statute, from the constitutional context in which it must be interpreted, and from our experience of fifty years.

With respect to the text, it can be noted that the phrase "such rules" refers to rules conforming to the three preceding sentences of the Act. Thus incorporated is the second sentence of the Act which denies to "such rules" the power "to abridge, enlarge or modify any substantive right." While this second sentence has never been applied by the Supreme Court to limit the effect of a Federal Rule conflicting with state or local practice in a diversity case, it does not follow that this sentence has no meaning in its relation to the supersession provision. What cannot be abridged, enlarged or modified under the Act surely cannot be superseded. Indeed, a fair reading of the text indicates that the term "substantive right" should and would be

read broadly to preclude supersession of any Congressional enactment serving a substantive political aim.

That the phrase may have different meanings in different contexts is a subtle point, but not a new one. It was reiterated by the Supreme Court in 1965 in Hanna v. Plumer, when it observed that: "It is true that both the Enabling Act and the Erie rule say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions." Insofar as Court-made rules overlap state law, they are properly viewed as an exercise of power possessed by the Congress under Article III of the Constitution and delegated to the Court under the Rules Enabling Act. Where, however, it is an Act of Congress that creates rights having apparent substance, it cannot be supposed that Congress intends its political decisions to be overturned by a non-political process. It therefore follows that only those enactments which are not "rationally capable of classification as" substantive are subject to displacement pursuant to the fourth sentence of the Act. Cf. Hanna v. Plumer, 380 U.S. 460, 470 (1965). Rules made under the Act thus have no effect on provisions integral to such political enactments as the National Labor Relations Act or the Civil Rights Act.

This narrow reading of the provision is rooted in the text of the Act, but it would be otherwise required in any case by the constitutional context in which the Act is situated. As the House Committee Report emphasizes, a broader reading of the

provision would raise the constitutional issue of improper delegation presented in INS v. Chadha. So limited to matters that are purely procedural, the constitutional issue may be perceived to be insubstantial. Certainly, the statute should not be read more broadly when a narrow reading derives from the text and substantially eliminates a constitutional concern.

Moreover, our fifty years of experience with the supersession provision confirms the narrowness of its application. There does not appear to be a single reported case in which a Civil Rule has been held to have superseded an Act of Congress, although there are a few cases in which Appellate Rules have been held to have superseded earlier enactments bearing on such matters as extensions of the time for appeal or the taxability of printing costs or proctor's fees in admiralty appeals. Reasons for infrequent application of the supersession provision are apparent from my prefatory explanation. Our Civil Rules are not written for purposes or in a textual style that are likely to generate much if any conflict with Congressional enactments. There is generally ample flexibility to permit our courts to reconcile procedure rules with your substantive enactments. Thus, it could be said that the supersession provision has worked satisfactorily in practice, and that the question now raised is whether it works in theory.

Functions of the Supercession Provision. My second point addresses the theoretical role of the supersession provision. Despite its narrowness and the infrequency of its use, the provision may have a continuing role in the subconstitutional

structure established by the Rules Enabling Act as that structure has evolved since 1934. There appear to be three possible utilities to the supersession provision as it now exists.

One is to facilitate the erasure of procedural marginalia that are occasional products of legislation, marginalia serving no discernible substantive political consequence, but otherwise intruding a disharmony into the general schemes provided by the Federal Rules. In this function, the supersession provision is kin to the law of desuetude, by which ancient and unloved statutes are retired from use by the courts. The provision thereby serves to promote the goal of generality in procedure rules and thus supports if weakly the first, central sentence of the Rules Enabling Act, and incidentally serves if weakly the aims of Rule 1.

A second possible utility is to confer on the third branch of the government a primary responsibility for its own effectiveness with respect to procedural housekeeping. Some state constitutions have conferred broader responsibility directly on highest state courts. By the supersession provision, Congress used its authority under Article III to take a modest and controlled step in the direction of judicial autonomy; it acknowledged a universe, albeit restricted, in which the technical and professional judgment of the third branch is the more appropriate determinant of its mode of operation. Approval of that step can be implied from the language of Article III itself, concerned as that text is with the values of judicial independence from politics. A Constitution favoring an apolitical judiciary can be

taken to encourage a delegation by Congress to the courts of the power to manage their own affairs so long as they do so with apolitical effect.

A third possible utility of the supersession provision is to define the role of Congress in the rulemaking process. In this respect, it is important to relate the fourth sentence of the Act to the third which delays effectiveness of Court-made rules pending a period of review by Congress. It can reasonably be inferred from the text of the Act that an important purpose of Congressional review of rules is to reduce the risk that a substantive right created by Congress might be seemingly abridged, enlarged, modified or superseded. While rules having these forbidden effects are invalid under the Act, it makes sense to abort them when possible conflict is detected by Congress, thereby avoiding uncertainty as to whether an enactment may have been superseded. If there is no supersession authorized by the Act, there is diminished justification for Congressional review. Eliminating supersession could then signal a purpose of Congress to review procedure rules not merely to see that they are indeed mere procedure, but to decide with respect to each rule whether the Congress might favor a different mode of judicial operation, thereby assuming primary responsibility for the effectiveness of the courts. If so, this would manifest a Congressional purpose to deny to the third branch a status enjoyed by federal administrative agencies that make their own procedure rules without routine review by Congress. For this reason, if the supersession provision is to be repealed, the Senate may wish also to consider

repealing the third sentence of the Rules Enabling Act, thus placing Court-made rules in equal status with administrative agency rules.

Conclusion

If the purpose of the restriction on supersession is to protect important substantive rights from impairment by court rule, the change seems quite unnecessary because no such rights are in jeopardy of supersession. On the other hand, the direct consequences of repeal of a narrow provision so rarely used are also slight. The issue presented is therefore largely symbolic, requiring the assessment of values that are ineffable.

Thus, by the proposed revision, Congress might diminish if slightly the autonomy and independence of the third branch with respect to its management of its own operations. It might signal its intention to assume for itself more direct responsibility for the processes by which its laws are enforced. And by playing a larger role itself, Congress might move our procedural law slightly in the direction of non-general rules having greater political sensitivity and content, and perhaps a tighter texture to confine the discretion of our judges.

No one can demonstrate from our own experience that it is a bad idea for Congress to enlarge its role in the fashioning of judicial procedure. Perhaps the time has come, as some have suggested, to emphasize rather than subordinate the political consequences of judicial procedure, and to develop new and different procedures tailored to particular political needs.

This would be a new role for Congress. For the first century and a half of our history, primary responsibility for the procedure employed in our Article III courts was exercised by state legislatures to whose laws the federal courts were directed to conform their practice. For the last fifty years, the primary responsibility has been exercised within the third branch itself. Novelty is, however, not a cause to condemn an idea; it is only a cause for caution.

The course to which substantial elimination of the supersession provision leads is a wise course if the Senate can venture affirmative answers to some or all of the following questions. Should we now move away from "general" procedure? Should our federal courts be more tightly confined in their discretion by more elaborate procedural standards tailored to particular political objectives? Does Congress have the means to lead us to procedures more likely to assure "the just, speedy and inexpensive determination of every action?" Or can Congress frame objectives of procedural reform which are superior to those stated in Rule 1? This list is not intended to be exhaustive.

I will not presume to answer these questions, but limit myself to the suggestion that to decide the issue at hand it is wise if not necessary to consider these broad questions.

PREPARED STATEMENT

OF

JOSEPH F. WEIS, JR.
CHAIRMAN
STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE

BEFORE THE

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON

THE RULES ENABLING ACT OF 1987
(Title II of H.R. 2182)

WEDNESDAY
MAY 25, 1988

Mr. Chairman, and members of the Subcommittee, I am Judge Joseph F. Weis, Jr., Chairman of the Judicial Conference Standing Committee on Rules of Practice and procedure. I submit this statement to summarize the Judicial Conference position on the Rules Enabling Act legislation pending in the Senate Committee on the Judiciary as title II of H.R. 2182, including the primary point of inquiry concerning the rules process for this hearing--the modification of the supersession clause. With the exception of a single suggestion for a clarifying amendment, the Judicial Conference generally supports the version of amendments to the Rules Enabling Acts pending as a part of H.R. 2182. In accordance with its policy adopted in September 1985 to withdraw its objection to repeal of the supersession clauses, the Conference does not object to the bill's provisions on this subject. Attached for the record is a copy of a letter to Chief Justice Rehnquist from Congressman Kastenmeier dated March 30, 1988, seeking to clarify the position of the Conference on specified Rules Enabling Act issues, and the Chief Justice's response thereto dated April 12, 1988.

As you know, there have been a number of efforts over the years to modernize the Enabling Acts that govern the manner in which the various rules and the rules of evidence are promulgated for use by the Federal courts. Under the

able leadership of then chairman of the Standing Committee, Judge Edward Thaxter Gignoux, the Judicial Conference has been an active participant in providing assistance to the Congress to develop the best possible legislation on this subject. Because of the origins of the legislation, Judge Gignoux's efforts were primarily a cooperative dialogue with Congressman Kastenmeier, Chairman of the House Judiciary Committee Subcommittee on Courts, Civil Liberties, and the Administration of Justice, and the members of his Subcommittee. They discussed the practical concerns of the Judicial Conference after extensive consideration by the Standing Committee and its Advisory Committees. We welcome the extension of this cooperative effort to the Senate and to your Subcommittee.

Mr. Chairman, while the pending legislation constitutes a desirable effort to improve and fine-tune the process for making national rules for the Federal courts, it should also be considered an opportunity to note and give due credit to a system that, for over five decades, has been a successful implementation of a plan for creating and maintaining a uniform and consistent set of rules of practice and procedure. The Federal judiciary has played an important role in this process by providing expertise and continuity within a structural framework as mandated by Congress. As noted by the House Committee on the Judiciary in its report on H.R. 3550 last Congress (H. Rept. No. 99-422, at page 7):

> This rulemaking process has worked, in part, because Congress has granted the judicial branch a high degree of deference due to that branch's intimate working knowledge of problems of practice and procedure. That more than half of the states have adopted parts of the Federal civil rules is a testament to the wisdom of the rules . . .

I think it is fair to observe that over the years the task of developing and maintaining procedural rules has come to be viewed as a cooperative endeavor between the Congress, the judiciary, and interested constituencies within the legal community. The Judiciary has been considered the preferred forum for the study, evaluation, and initial promulgation of rules and amendments thereto and the Congress the overseer of the process and, as deemed appropriate within the political context at the time, a final arbiter of some relatively significant rules issues. The legal constituencies have provided a sounding board for procedural rules and rules of evidence at both the Judicial Conference committee level and the Congressional level. Overall, We feel that the rules process has worked remarkably well over the years and has been responsive to the perceived concerns of Congress, as well as to the desire that excellence in substantive result emerge from the process.

Mr. Chairman, I would like to make the point that the Judicial Conference and the Federal judiciary not only readily accept, but take very seriously, the responsibility

for rulemaking. Substantial effort is made to bring to bear on this process the best talent in the bench and bar. The process has become much more open over the past decade, a trend that would culminate in the pending legislation in favor of open meetings. One of the reasons the judiciary favors strengthening the rules process through the pending legislation is the expectation that Congress will have continued and enhanced confidence in the methodology itself. In the recent past, some members of the Senate and the House have felt it desirable at times to bypass the rules process and enact proposals directly by legislation. While perhaps understandable under certain circumstances, this practice can be most demoralizing to the Committees and individuals who expend considerable time and resources in preparing draft rules. As chairman of the Standing Committee on Rules of Practice and Procedure, I am committed to the operation of a rulemaking process that is as open as possible and designed to encourage interested parties to bring their recommendations, suggestions, and complaints to the appropriate Judicial Conference committee for consideration.

All of the participants in the process suffer if persons affected by proposed rules amendments bypass the Judicial Conference structure in favor of voicing their concerns, often quite vigorously, in the Congress.

Interested persons should feel that they have a realistic opportunity to have an impact on proposed rules at the Judicial Conference level. The judiciary should have the benefit of such views at a stage that permits evaluation and the opportunity to make a record discussing the policy issue involved. The new procedures make that possible.

Having made these general remarks on the rulemaking process, I think it would be useful briefly to summarize the participation of the Judicial Conference in the consideration of various Rules Enabling Act bills.

In September 1983 the Conference expressed its views on H.R. 4144 in the 98th Congress (see Conf. Rept., pp. 65-66). The successor to that bill--H.R. 2633 in the 99th Congress--incorporated many of the Conference's previous recommendations but also interjected new matters. Judge Gignoux, then Chairman of the Judicial Conference's Standing Committee on Rules of Practice and Procedure, filed a statement of his views on the new legislation in July 1985. See Rules Enabling Act of 1985, Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, U.S. House of Representatives, 99th Cong., 1st Sess., pp. 238-262 (1985). Judge Gignoux supported certain portions of the legislation but noted four matters of significant concern

relating to (1) a repeal of the traditional "supersession" clauses; (2) a provision that rules "shall not . . . supercede any provision of a law of the United States"; (3) a requirement that the Supreme Court submit legislative proposals to implement proposed rules; and (4) a requirement that committee meetings be open.

In September 1985, the Judicial Conference endorsed the views expressed by Judge Gignoux, with two exceptions: First, the Conference declined to object further to elimination of the "supersession" clauses and, second, declined to object to a requirement to submit implementing legislation, provided that the responsibility was placed with the Judicial Conference rather than the Supreme Court. See Conf. Rept., pp. 58-59. Judge Gignoux informed the Subcommittee of this action in late September 1985. See, Hearings on the Rules Enabling Act of 1985, supra, at pp. 274-275. In the subsequent development of H.R. 3550 in the 99th Congress, either in the House before House passage or as a part of an effort to move H.R. 3550 in the Senate, amendments were made, or agreed to, to deal with Judge Gignoux's second and third concerns as modified by the Conference and the Conference's objection to the open meeting provisions was dropped.

Mr. Chairman, the provisions in the Rules Enabling Act now pending before the Senate Judiciary Commitee as title II of H.R. 2182, as well as other proposals on this subject introduced by Congressman Kastenmeier in the House this Congress (H.R. 1507 and title II of H.R. 3152), are, except for minor changes, identical to H.R. 3550 as reported by the House Judiciary Committee (see H.Rept. No. 422, 99th Cong., 1st Sess. (1985) and passed by the House in the 99th Congress. The Judicial Conference, therefore, continues its general support for enactment of the provisions set forth in these various proposals and, in particular, does not register an objection to the elimination of the supersession concept as applicable to enactments of Congress, other than enactments of Congress to amend an existing rule or to add a new rule to the rules of procedure or evidence.

With respect to the latter point, that the Judicial Conference rules process should apply to all rules regardless of their origin, the suggestion has been made that it would be helpful to have a clarifying amendment made to remove a possible ambiguity in the section 2072(b)(3) of title 28 added by section 202 of H.R. 2182. This paragraph was intended to make it clear that the Judicial Conference rulemaking procedure could be used to amend any rule or part thereof, notwithstanding the fact that such rule or part had as its source an Act of Congress. As noted in a letter from

the Director of the Administrative Office of the United States Court to you dated September 1987 (copy attached) and a similar letter to Senator Biden dated January 13, 1988 (copy attached), one arguable construction of the paragraph as drafted would prevent a new rule enacted by Congress after the effective date of the new Rules Enabling Act from subsequently being amended through the rulemaking procedure. This interpretation can be obviated by amending the new section 2072(b)(3) to read as follows:

> (3) consisting of an amendment (including a new rule) made by Act of Congress to the rules described in paragraph (1) or (2) of this subsection.

This clarifying change was included in title II of H.R. 3152 as introduced by Congressman Kastenmeier on August 6, 1987 and was carried forward with technical amendments in H.R. 3152 as reported by the House Judiciary Committee Subcommittee on Courts, Civil Liberties, and the Administration of Justice on May 12, 1988. I know of no objection to this minor clarification. It would be appreciated if you could take the initiative to ensure this amendment is made when the Judiciary Committee considers the Rules Enabling Act proposals pending before it.

I appreciate the opportunity to present a statement to the Subcommittee for the record on this important subject. The Judicial Conference and the Standing Committee on Rules of Practice and Procedure stand willing to assist you and your staff in any way possible as the Committee considers

H.R. 2182. You may feel free to contact me directly or contact the staff of the Office of Legislative and Public Affairs in the Administrative Office.

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U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515-6216
Telephone: 202-225-3951

March 30, 1988

The Honorable William H. Rehnquist
Chief Justice
United States Supreme Court
1 First Street, N.E.
Washington, DC 20543

Dear Chief Justice Rehnquist:

As you know the Subcommittee on Courts, Civil Liberties and the Administration of Justice, which I chair, has pending before it H.R. 3152, the Omnibus Court Reform Act of 1988. Title II of that bill reforms the rulemaking process in the Federal courts. As we proceed to mark up the bill it will be helpful to ascertain the views of the Judicial Conference on two important issues.

Based on the recent testimony of Judge Hunter, a letter from Chief Justice Burger (dated June 25, 1984) and a letter from Judge Gignoux (dated July 11, 1985) it would appear that the Judicial Conference of the United States supports title II of H.R. 3152. Specifically, the Conference favors the repeal of the "supersession clause" proposed by H.R. 3152. In addition, the Conference appears to favor retention of the Supreme Court as the final promulgation of Federal rules. It will aid the Subcommittee if you could inform us whether these views continue to reflect conference policy.

Thank you in advance for your assistance in this matter.

With warm regards,

Sincerely,

ROBERT W. KASTENMEIER
Chairman
Subcommittee on Courts,
Civil Liberties and the
Administration of Justice

RWK:dbv

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 12, 1988

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Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil
Liberties and the Administration of Justice
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515-6219

Dear Mr. Chairman:

I am pleased to respond to your inquiry of March 30, concerning existing Judicial Conference and Supreme Court policy on various aspects of Title II of your bill, H.R. 3152, amendments to the Rules Enabling Act.

I would concur with the enclosed excerpt from the statement of Judge Hunter presented to your Subcommittee in September 1987, that the Judicial Conference generally supports your latest version of amendments to the Rules Enabling Act. We were privileged to have worked closely with you in the development and refinement of numerous provisions of the bill and we appreciate that opportunity.

Regarding the point of former Chief Justice Burger's letter to you of June 1984, that "it would be better to keep the ultimate authority of passing on rulemaking within the Court as it is now," I have no reason to believe there has been any change in the opinion of the Court. The Judicial Conference has also deemed this a policy matter for the Congress and the Court to resolve. See Reports of the Proceedings of the Judicial Conference of the United States (1983) pp. 65-66.

Regarding the supersession issues, it should be noted that Judge Gignoux in his letter to you of July 11, 1985, did find "disturbing," proposed section 2072(b) of title 28, repealing the supersession clause. The Judicial Conference modified the Gignoux letter by its action of September 17, 1985, in which it endorsed his letter but also specifically "declined to object further to elimination of the 'supersession clause'." Judge Gignoux then transmitted notice of this action to you by letter of September 24, 1985, which reflects the latest action by the Conference.

I stand willing to give whatever assistance I am able, within the confines of Court and Conference policy. Again, we thank you for soliciting our views on this matter of interest to the Judiciary.

With warm regards.

Sincerely,

William H. Rehnquist

Enclosure

RPTS SULLIVAN
DCMN SULLIVAN

H.R. 3152, COURT REFORM AND ACCESS TO JUSTICE ACT OF 1987

Wednesday, September 23, 1987

House of Representatives,
Subcommittee on Courts, Civil Liberties, and the Administration of Justice,
Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:25 a.m., in room 2237, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Berman, Cardin, Moorhead, Hyde, Lungren, and Coble.

Staff present: Michael Remington, counsel; David Beier, assistant counsel; Audrey K. Marcus, clerical staff; and Joseph V. Wolfe, minority associate counsel.

president of the American Bar Association, and I suspect that he also is on behalf of his organization.

The second part of your bill codifies the Rules Enabling Act. I won't go into that in this short presentation because it is fully set out in the written statement which has been filed, and we simply express our gratitude to you and to your very fine staff for the understanding that you have shown in the way you have set it out. We endorse it 100 percent.

Title III of your bill deals with arbitration. I have some special knowledge of the arbitration process because I come from one of the districts where there is an ongoing arbitration program of an experimental nature which the Congress has so generously funded. Presently, we have two arbitration bills. We have yours, and we have the one that has been proposed by the Judicial Conference. There is not very much difference between the two.

If I might get to the bottom line on it, your bill is a little more strict in what it requires. Our bill allows a good deal more experimentation, and we have found out in the short time that we have been into the experimentation process that it is greatly needed. We need some more information before we can come before you and tell you what specifics we think you should have in your bill.

So we approve of what you have done, and we hope that you

PREPARED STATEMENT

OF

ELMO B. HUNTER
CHAIRMAN
COMMITTEE ON COURT ADMINISTRATION
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND THE ADMINISTRATION OF JUSTICE
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

ON

THE COURT REFORM AND ACCESS TO JUSTICE ACT OF 1987

WEDNESDAY
SEPTEMBER 23, 1987

Yet the bill has floundered each time it has been offered. Sometimes it failed simply for lack of time. Sometimes it became a vehicle for more divisive measures. It is our view that the time is ripe to complete this long-needed reform and we urge speedy action in the Committee and on the floor.

There are some minor technical matters to be resolved. The three bills ending before Congress — S. 952, S. 1482, and H.R. 3152 — vary in slight degrees. A chart setting forth these differences is attached as Appendix C. None appear substantive and we believe that all can readily be resolved by the interested parties.

B. Rules Enabling Act (Title II).

The Judicial Conference has taken an active interest in rules enabling act proposals over the years and supports the Rules Enabling Act amendments proposed in Title II of H.R. 3152.

In September 1983 the Conference expressed views on H.R. 4144 in the 98th Congress (See Conf. Rept., pp. 65-66). The successor to that bill — H.R. 2633 in the 99th Congress — incorporated many of the Conference's previous recommendations but also interjected new matters. Judge Edward T. Gignoux, Chairman of the Judicial Conference's Standing Committee on the Rules of Practice and Procedure, filed a statement of his views concerning the new legislation in July 1985. See Rules Enabling Act of 1985, Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, U.S. House of Representatives, 99th Cong., 1st Sess., pp. 238-262 (1985). Judge Gignoux supported certain portions of the legislation but noted four matters of significant concern relating to (1) a repeal of the traditional "supersession" clause; (2) a provision that rules "shall not . . . supercede any provision of a law of the United States"; (3) a requirement that the Supreme Court submit legislative proposals to implement proposed rules; and (4) a requirement that committee meetings be open.

In September 1985, the Judicial Conference endorsed the views expressed by Judge Gignoux, with two exceptions: First, the Conference declined to object further to elimination of the "supersession" clause and, second, declined to object to a requirement to submit implementing legislation, provided that the responsibility was placed with the Judicial Conference rather than the Supreme Court. See Conf. Rept., pp. 58-59. Judge Gignoux informed the Subcommittee of this action in late September 1985. See, Hearing on the Rules Enabling Act of 1985, supra, at p. 274-275. In the subsequent development of H.R. 3550 in the 99th Congress, amendments were either made, or agreed to, to deal with Judge Gignoux's second and third concerns as modified by the Conference and the Conference's objection to the open meeting provisions was dropped.

Title II of H.R. 3152 reflects the changes in predecessor bills to accommodate the concerns of the Judicial Conference. The Conference, therefore, has no objection to its enactment.

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

January 13, 1988

Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Dear Mr. Chairman:

I appreciate your affording the Judiciary the opportunity to comment on the Rules Enabling Act of 1987 as passed by the House as title II of H.R. ~~3152~~ 2182 on June 22, 1987.

The Judicial Conference of the United States has no objection to enactment of title II of H.R. 2182 as passed by the House. Enclosed for your information is a copy of an excerpt from the testimony of Judge Elmo B. Hunter on behalf of the Judicial Conference of the United States on September 23, 1987, before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice endorsing almost identical provisions of H.R. 3152.

There is, however, an ambiguity in the Rules Enabling Act part of H.R. 2182 — an ambiguity that had been corrected in H.R. 3152 — that should be resolved. The new section 2072(b)(3) of title 28 added by section 202 was intended to make it clear that the Judicial Conference rulemaking procedure could be used to amend any rule or part thereof, notwithstanding the fact that such rule or part had as its source an Act of Congress. Several members of the Advisory Committee on Civil Rules have pointed out that one arguable construction of the parargraph would prevent a completely new rule enacted by Congress after the effective date of the new Rules Enabling Act from subsequently being amended through the rulemaking procedure. To correct this possible interpretation, the new section 2072(b)(3) should be amended to read as follows:

> (3) consisting of an amendment (including a new rule) made by Act of Congress to the rules described in paragraph (1) or (2) of this subsection.

We have previously communicated this concern to Senator Heflin as Chairman of the Subcommittee on Courts and Administrative Practice and requested his assistence to ensure that this clarifying amendment is made at the time the Committee considers the legislation. We would also welcome your attention to ensuring the correction is made in Committee.

If you have any questions, please have your staff contact Paul Summitt in our Office of Legislative and Public Affairs (633-6040).

Sincerely,

James E. Macklin, Jr.

James E. Macklin, Jr.
Deputy Director

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, III
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

September 10, 1987

Honorable Howell Heflin
Chairman, Subcommittee on Courts
and Administrative Practice
Committee on the Judiciary
United States Senate
223 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

At the last meeting of the Judicial Conference Advisory Committee on the Rules of Civil Procedure, one of the members pointed out a possible ambiguity in the new section 2072(b)(3) of title 28 added by section 202 of the Rules Enabling Act of 1987 passed by the House on June 22 as Title II of H.R. 2182. This paragraph was intended to make it clear that the Judicial Conference rulemaking procedure could be used to amend any rule or part thereof, notwithstanding the fact that such rule or part had as its source an Act of Congress. One arguable construction of the paragraph would prevent a new rule enacted by Congress after the effective date of the new Rules Enabling Act from subsequently being amended through the rulemaking procedure. To correct this possible interpretation, the latest version of the Rules Enabling Act amendments introduced on August 6 by Congressman Kastenmeier as Title II of H.R. 3152 changed the new section 2072(b)(3) to read as follows:

> (3) consisting of an amendment (including a new rule) made by Act of Congress to the rules described in paragraph (1) or (2) of this subsection.

I would appreciate it very much if, in the event the Senate Committee on the Judiciary acts upon Rules Enabling Act legislation, you could ensure that this clarifying amendment is made.

If you have any questions, please contact Paul Summitt on our Legislative and Public Affairs Office staff at 633-6040.

Sincerely,

L. Ralph Mecham
Director

June 9, 1988

The Honorable Howell Heflin
Chairman, Subcommittee on Courts and
Administrative Practice
United States Senate
Washington, DC 20510

Dear Senator Heflin:

We are writing about a provision contained in the bill to amend the Rules Enabling Act, marked up by the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice as Title I of H.R. 3152 on May 12, 1988 (and also passed in similar form by the House of Representatives as Title II of H.R. 2182, on June 22, 1987), which governs the rulemaking procedures for the federal courts. We strongly urge the members of the Senate Subcommittee on Courts and Administrative Practice to retain the language in the bill (amending 28 U.S.C. § 2072(b)), which makes clear that the rules promulgated by the Supreme Court do not override statutes.

This section would replace a sentence in the existing law (28 U.S.C. § 2072) which, unfortunately, says that after rules are promulgated and after a "layover period" in Congress, "All laws in conflict with such rules shall be of no further force or effect . . .." This "supercession" sentence in § 2072 was enacted in 1934, and was designed to provide for the repeal of antiquated practice and pleading provisions then in the U.S. Code and to allow for an orderly transition to the first Federal Rules of Civil Procedure.

If you amend the Rules Enabling Act and do not remove this sentence, but instead re-enact it, that legislative move could be interpreted as empowering the rulemakers to develop rules that --- once they survive a Congressional layover period --- could amend or repeal acts of Congress. The rules would then have a legal force not only equal to statutes but actually greater, because they could repeal statutes sub silento. The persons who design and draft such rules (before forwarding them to the Supreme Court to transmit to Congress) are essentially a small group of lawyers and judges chosen by the Chief Justice. Empowering them to amend or repeal acts of Congress is simply a very bad --- and possibly unconstitutional --- idea.

Retaining the supercession sentence undermines the democratic process and enhances the possibility that the rulemaking process will be used to enact rules beyond the scope intended by Congress and affecting substantive rights. In recent years, the rules committees have shown an inclination to propose rules amendments that are inconsistent with acts of Congress. For example, in 1983 and 1984 the Advisory Committee on Civil Rules proposed amendments in Rule 68 that conflicted sharply with federal statutes providing court awards of attorneys' fees to plaintiffs who serve as "private attorneys general" in civil rights, environmental, and in other categories of public law litigation. These proposals were defeated after strong public opposition. In 1984, the Advisory Committee on Criminal Rules proposed an amendment to the Rules Governing Section 2254 Cases and Section 2255 Proceedings (for habeas corpus relief) which commentators and scholars believed would seriously compromise statutory and constitutional rights to seek habeas corpus relief. This proposal was also withdrawn after public comment and criticism. Although Congressional and other opposition has prevented the adoption and implementation of these rules changes, these examples illustrate the importance of Congress limiting the rulemaking authority so that existing statutory rights are protected.

Because proposed rules amendments are not always well-conceived, and could have an adverse effect on existing legal rights, the enabling legislation should not provide that rules amendments will "trump" or "supersede" acts of Congress, because Congress does not enact legislation disapproving the rules during the layover period. It is not realistic to expect that Congress will be able to consider and enact legislation each time that amendments to the rules are forwarded, and it's particularly unlikely that in a layover period of just a few months Congress will be able to anticipate, before the new amendments take effect, the various ways in which those amendments may clash with existing statutes.

For these reasons, we urge that the Senate Subcommittee on Courts and Administrative Practice retain the section in the House bill eliminating the supercession clause when it acts on the legislation. That section is a well-thought out, carefully drafted, and legally sound provision. If it is eliminated from the legislation and the sentence in existing law is re-enacted, the result may be unconstitutional and will certainly be a less sound rulemaking process than would otherwise exist.

We stand ready to work with your Subcommittee and staff to ensure the enactment of appropriate legislation.

Sincerely,

Nan Aron

Nan Aron
Alliance for Justice
662-9548

Morton H. Halperin and
Antonio Califa
American Civil Liberties
Union

Alan Houseman and
Linda Perle
Center for Law and Social
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Laura Macklin and
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September 6, 1988

Ms. Karen Kremer
Senate Subcommittee on Courts and
Administrative Practices
United States Senate
Washington, DC 20510

Re: Commentary on S. 2161

I am in receipt of the memorandum prepared by Robin E. Phelan, Esquire, dated August 15, 1988 regarding Senator Bentsen's Bill S. 2161, which was forwarded to you with a letter of the same date from his partner Terry I. Cross. Mr. Phelan sets forth an interesting theoretical analysis of how the oil and gas industry could possibly be altered to try and fit with the unintended problems arising from recent interpretations of Section 541 and 544 of the Bankruptcy Code. I cannot accept, however, Mr. Phelan's premise that the oil and gas industry should adopt a new way of doing business. S. 2161 is designed to address everyday problems in the oil and gas industry as they exist and without trying to artificially influence and encumber well understood and historically successful business practices.

Farmout agreements or letter agreements related to them are generally not recorded because neither the lease owner granting the farmout nor the company granted the farmout (the "farmee") wants them recorded. From the lease owner's perspective, recording farmout agreements will significantly hamper its ability to maintain clear title to its property. For example, the owner of leases for 10,000 acres in a certain county of Texas may agree to allow a company to drill ten wells on that acreage at locations to be mutually agreed upon in the future and to allow the company to earn 40 acres around each oil well and 160 acres around each gas well if such wells produce in paying quantities. This means that the maximum amount of acreage the company can earn is 1600 acres. No lease owner will allow the title to its 10,000 acres to be clouded, by recording the farmout or a memorandum of farmout, by this right to earn only 1,600 acres. Recording is equally unattractive from the farmee's perspective. For example, the farmee may have information which causes it to want to drill a certain 900 acre area, the leases for which are held by three different companies owning 300 acres each. The farmee will try to obtain a farmout for 300 acres from each owner. Unfortunately, if

the farmee is required to record each of the farmouts as he obtains them, he will almost certainly never get them all. Once company B learns that company A has granted a farmout on the acreage, it is in company B's interest to sit back and wait until the well is drilled on A's property before granting a farmout on its own. If the well is productive, B will drill its own wells and the farmee will have no opportunity to earn an interest in the acreage of companies B and C after having assumed all of the risk on Company A's land. Alternatively, if the farmee does not record its farmout agreement with Company A, he runs the risk of losing the interests it has earned by virtue of the Bankruptcy Code. Neither of these options is attractive. As to investors and others holding letter agreements with a farmee which entitle them to a percentage of the interest earned under a farmout agreement, they have no control over whether the farmout agreement or a memorandum relating to it are recorded. Such investors and others are not a party to these farmout agreements. They typically enter the transaction after the farmout agreement has been executed. And even if letter agreements are recorded, they will not form a portion of the chain of title from the grantor so no constructive notice will be provided.

Finally, there are countless unrecorded farmout agreements and letter agreements related to them which form the real world relationships among parties in the oil and gas industry today. These persons have no leverage to renegotiate their transaction in light of the recent developments under the Bankruptcy Code to make their agreements suitable for recording, even if they chose to do so. Mr. Phelan's memorandum suggests that these persons, who have followed industry practice, should be penalized. S. 2161 takes a different, and more realistic view.

Mr. Phelan in his memorandum offers no relief or solution for the problems surrounding unrecorded farmout agreements under the Bankruptcy Code. He does suggest that protection be afforded under Section 365(i) of the Bankruptcy Code to prevent <u>recorded</u> farmout agreements from being rejected as executory contracts. This protection would of course not be necessary under S. 2161 as the amendment to Section 541 it contains would prevent farmout agreements and interests earned under them from becoming part of the debtor's estate. Mr. Phelan also suggests that Section 365(i) could protect farmees under farmout agreements which, by virtue of the farmee completing performance, are no longer executory contracts. He proposes extending the protection of Section 365(i) "for a sufficient period of time to allow recordation." Again, this protection would by its terms, at best, be applicable to interests earned under recorded farmout agreements and would have no application to interests under unrecorded agreements. The amendment to Section 541 of the Bankruptcy Code contained in S. 2161 solves this problem by completely excluding interests earned under farmout agreements from the debtor's estate. It is the most efficient way to handle the farmout problem.

In the closing paragraph of his memorandum Mr. Phelan recognizes that the Bankruptcy Code should be changed, and the proponents of S. 2161 agree. The Bankruptcy Code is not static. It must evolve and be flexible as the circumstances require. S. 2161 fosters that policy of flexibility which, in this instance, is critical to the continued development of our domestic oil and gas reserves.

Very truly yours,

Frederick G. Fisher, Jr.

FGF/jab
cc: Danny Conklin
Hugh M. Ray, Esq.
Robin E. Phelan, Esq.